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CASE OF DR. HAMPDEN.

THERE has not arisen, for many years, in the English courts, a case that has excited so general an interest, and affected so many important questions, as that of *The Queen* v. *The Archbishop of Canterbury*. To understand it in its various bearings, and to appreciate its importance, we must acquaint ourselves with the mode of appointment to bishoprics at the present time. The king issues a *congé d'élire* to the dean and chapter of the vacant diocese, and they elect a person for the office. The election is then certified to the archbishop, who proceeds to hold a service of confirmation. After the election has been confirmed, the bishop elect is consecrated; and it is by the service of consecration that he receives all the spiritual and temporal powers of his office. This threefold process is analogous to that known in most cases of appointment in this country, viz.: nomination by the executive, confirmation by a senate or council, and commission. The dean and chapter designate a person. The archbishop, as the chief officer of the church, holds a public service, to which all objectors are cited to appear, and show cause, if any they have, why the election should not be confirmed. When confirmed, the appointment is complete, and the consecration gives the commission. So, in the Episcopal church of the United States, a

bishop is elected by the diocese; this election must be confirmed by the church at large, acting through its bishops and committees of presbyters; and when confirmed, the party elected receives his consecration.

The process, in England, would be a simple one, were it not for the statute 25th Henry VIII., chap. 20, upon the construction of which all the difficulty arises. By this statute, the king, at the same time with the *congé d'élire*, sends a *letter missive* to the dean and chapter, recommending a certain person for election. The statute then runs as follows:

"And if the said dean and chapter, after such license and letters missive to them directed, within the said twenty days do elect and choose the said person mentioned in the letters missive, according to the request of the King's Highness, &c., then their election *shall stand good and effectual to all intents;* and that the person so elected after covent seal of the electors to the King's Highness, &c., *shall be reputed and taken by the name of the Lord Elected of the said dignity and office* that he shall be elected unto; and then making such oath and fealty only to the King's Majesty, &c., as is and shall be appointed for the same, the King's Highness, by his letters patent under his great seal, shall signify the said election if it be to the dignity of a bishop to the archbishop of the province where the See was void, *requiring and commanding him to confirm the said election, and to invest and consecrate the person* so elected, and to give and to use to him all such benedictions, ceremonies, and other things requisite for the same, without any suing, procuring, or obtaining bulls, &c., from Rome, &c."

Another section subjects the dean and chapter to the penalties of a *præmunire* if they fail to elect the person named in the letters missive within twenty days; and subjects the archbishop to the like penalty, if he shall not complete the consecration within twenty days after the receipt of the letters patent. The object of limiting the time was to prevent any appeal to the court of Rome; and the statute, generally, was intended to deprive the Pope effectually of every opportunity to control the nomination, confirmation, or consecration of English bishops. The service used at confirmation is an ancient one, having been used, with little alteration, for a long time before, and ever since the reign of Henry VIII. At one stage in the service proclamation is made, and all persons are solemnly adjured to bring forward any objection they may have to the person elected, and show cause why he should not be confirmed. At a later stage all objectors are declared to be in contumacy and default for not having brought forward their objections, and are shut out from urging them afterwards. The election is then solemnly confirmed.

In the case of the vacancy in the diocese of Hereford, the crown named Dr. Hampden in the letter missive. The dean and chapter were opposed to his election, and made their opinions known to the ministers of the crown. Lord John Russel replied by simply reminding them of the *præmunire*, and, there being no escape, they elected Dr. Hampden, under an ineffectual protest. The confirmation service was held by the archbishop, acting, as he is entitled to, through his vicar-general. At the proclamation for objectors, certain of the clergy of the diocese of Hereford appeared and claimed to be heard. The vicar-general decided that the statute was peremptory, obliging him to confirm, under the penalties of a *præmunire*, and that he therefore had no power to hear objectors. At the second proclamation the objectors appeared again, and were shut off in like manner. When objectors were declared in default for not having appeared, these parties protested, and there was a pretty general shout of derision at the farce of the proclamation, and cries of "mockery," "mockery."

The objectors then applied to the court of queen's bench, to issue a writ of mandamus to the archbishop of Canterbury, requiring him to hear them. The question for the court to decide was whether such a writ should be issued, and it arose in the usual manner upon a motion to have the rule *nisi* made absolute.

In support of the rule appeared Sir Fitzroy Kelly, Dr. Addams, Messrs. E. Badely, A. S. Stephens and B. Peacock. Against the rule were the Attorney-General, the Solicitor-General, Drs. Bayford and Twiss, and Messrs. M. D. Hill and Waddington.

It should be borne in mind that the granting of the writ would not be a decision of the cause. It only made it a case of record, to be decided upon the return, or upon demurrer, and capable of being appealed. Nor was the ground of objection to Dr. Hampden material. The right to object at all was the question; and the principle would be the same in case of a charge of immorality or gross crime.

The arguments were very full and learned, and it is many years since so much of the law of prerogative, relating to the ecclesiastical supremacy of the crown, and so much learning in ancient canons has been ventilated in Westminster Hall. The

counsel for the motion relied chiefly upon the uniform practice of the court to grant this writ where there is a reasonable appearance of cause; and to show cause, they contended that confirmation is a judicial and not an executive act, had always been so considered before the statute of Henry VIII., and was not altered by that statute. Against the motion, it was contended that confirmation, whatever it might have been before the statute, was by the statute reduced to a merely executive, compulsory act.

Upon the bench were Lord Denman, chief justice, and justices Patteson, Coleridge and Erle. The opinions were delivered *seriatim*.

Mr. Justice Erle. In support of the application it is contended that confirmation is a judicial act, in which the archbishop tries judicially the validity of the election, and the qualifications of the elected person, and that others have a right to come forward and object, and that the archbishop is to deliver his judgment thereon. They contend further that this right if refused, may be enforced by a writ of mandamus. The question depends upon the construction of the statute 25 Henry VIII. ch. 20. [The learned judge here quoted from the statute.] This brings us to the question whether the word "confirm" is to be taken as meaning that the archbishop is to try the qualifications of the person elected? The statute is a command to confirm, "requiring and commanding him to confirm, &c." This does not involve, nor indeed admit of a right in the party commanded to confirm or not according to the judgment he may form. The statute provides that the election "shall stand good and effectual to all intents." This cannot be, if it may be disaffirmed by the archbishop. It then says that the person elected "shall be reputed and taken by the name of the lord elected of the said dignity and office," which is incompatible with his being liable to be pronounced disqualified by the archbishop. He is then to take the oath of fealty, and then the king issues his letters patent to the archbishop, "requiring and commanding him to confirm, &c." within twenty days. This is inconsistent with a right in the archbishop to invite and receive objectors and decide upon the qualifications of the party.

It is said that the word "confirm" has a technical sense in the canon law, and includes an examination into qualifications; that this power was exercised throughout the Christian world down to the time of Henry VIII., and that the legislature intended the word to be taken in that sense. It does not appear to me that the alleged practice and understanding is proved. The canon requiring confirmation was pertinent to contested elections by large numbers, but not to a nomination by the king. In the reign of Henry VIII., parliament appointed a commission to revise the canon law, and provided that until they had completed their task such canons only should be in force as are "not contrarient to the laws and customs of the realm." It is hardly to be supposed that a parliament which showed such jealousy of the canon law would use the term "confirm" in its technical sense. If it is not clearly made to appear that the technical sense was the sense intended, we must take the statute in its common sense, as a command to confirm or ratify, at all events. The form of proclamation used at the service of confirmation can be of no avail against the statute, for it is not authorized by act of parliament. It is only the vestage of a right which has ceased.

An attempt has been made to show that objections have been made and acted upon, at confirmation, since the statute; but I do not think the facts are made out. If the evidence of the practice fails, so does that of the opinion of commentators. I

think the opinions of text-writers are decidedly averse to the right claimed. It is said the object of the statute was to prevent interference from Rome. I think it was also to establish the appointing power actually in the crown, leaving only the forms of election and confirmation. I am of opinion that the supposed right does not exist, and therefore that the rule must be discharged.

Mr. Justice Coleridge. The question is whether the applicants have laid such grounds before the court, as, according to the usual course, entitle them to the writ. There is no question that the applicants have a sufficient interest, some of them being clergymen of the vacant diocese; that this court has jurisdiction to issue this writ, and that the remedy sought is the proper remedy. The question arises on the construction of the statute. The statute requires that after the election, the archbishop shall confirm and consecrate the person elected. In what sense is the word "confirm" used? On the one hand it is said that the duty is purely ministerial, leaving no discretion. On the other hand it is said that "confirm," with reference to the election of a bishop, had an established meaning, in which sense parliament must have intended to use it, and which involves a judicial act. The command to proceed to confirmation is positive, but what confirmation is, the statute does not say. The *onus* is on those who contend for the latter construction.

It should be borne in mind that this is not a decision of the main question. That arises on the return made to the writ, or on demurrer, and thus becomes matter of record and of appeal. It is therefore enough for me to say that the applicants have laid such grounds before the court, as, in my opinion, entitle them to the preliminary proceeding. The practice of this court has uniformly been to allow the writ in all cases where there is not an absolute certainty in practice, or a clear and unanimous opinion in the minds of the court, against the claim of the applicants. By granting the rule we merely say that enough has been shown to justify further inquiry, and a more solemn decision.

To my mind there is no question that by the canons of what Hooker calls the four most famous councils, the metropolitan had jurisdiction to revise an election, which was a judicial act, and involved an inquiry into the fitness of the party elected. The councils were the origin of the general canon law, and our ecclesiastical courts governed themselves generally by the canon law. Concurrent with this, we had a national canon law. It is true that a commission was appointed in the time of Henry VIII. to revise the canon law, but nothing came of it. I will not follow the citations from the canon law, but will only say that I think the result is left clear that by the ecclesiastical law of the realm at the time the statute in question was passed, the election of bishops was subject to confirmation by the metropolitan, and that such confirmation was a judicial act and implied the right to disaffirm. [The learned judge then cited cases from Wheaton's "Anglia Sacra" of bishops elect whose elections were set aside by the metropolitan, some for having been pluralists, and others for other causes. In some instances the bishop elect appealed to the Pope, which gave rise to the papal intervention and claim, and then came statutes to prevent this appeal, but all admitting the jurisdiction of the metropolitan.]

When the statute of Henry VIII. came to be passed, the framers had to deal with the confirmation of bishops as an established canonical act, with an established canonical signification; and when they used the term "confirm" without explanation, they must be considered as using it in the then established signification. That it was so understood at the time is apparent from the fact that the service of confirmation was not altered, but during all that reign and ever since, the proclamations for objectors to appear, have been used, and objectors who do not then appear are pronounced in default.

The statute had two objects, first to establish in the crown the right to nominate bishops, who had once been purely elective, and then subjected partially to Roman influence; and secondly, to prevent all intervention from Rome, either by appeal or by waiting for a papal bull authorizing confirmation. To meet the second object, the metropolitan was required to proceed at once to confirmation and thence to consecration.

The statute first uses the term "election," giving no definition of it, and necessarily

referring to its established signification. Then it uses the term "confirm," as applied to the act of the archbishop, also without definition or limitation. Great stress has been laid on the language of the statute that the election should stand good to all intents, and the person elected should be reputed and taken as the lord elected, &c. Taken in connection with the rest of the statute, this means that the election, as an election, shall stand good, and means to forbid any idea of papal authority or sanction being necessary; but not to exclude the subsequent test of confirmation. Had the archbishop, after this statute, asked, "how am I to *confirm?* the answer would have been, "Do as you have always done — as your predecessors did." In this view the confirmation service has been continued to this day, which, if objectors cannot be heard, is not only an insult and a mockery, but a plasphemous mockery, for the most solemn invocations are used. It is said that no instances have occurred since the statute, of the rejection of any person elected. Attempts have been made at the bar to show such instances, but not with entire success. I would not stand on this evidence. There may have been various reasons why objections have not been urged, and instances may have occurred which are not recorded, or have not been found. The failure to prove a use of the right, does not weigh against the constant use of the service.

Believing that the applicants have shown a case which deserves to be made matter of record and of more solemn decision, I think the rule should be made absolute.

Mr. Justice Patteson. It appears to me to be established, satisfactorily, that in all christian countries, in England as well as others, whenever a bishop was elected, from the earliest councils to the time of the statute of Henry VIII., whether by the people or by the clergy and people, or by the clergy alone, or by chapters or convents, the election was required to be afterwards confirmed, in order to perfect it; that this confirmation was the act of some spiritual superior; that it was a judicial and not a ministerial act — one which involved an inquiry into the regularity and sufficiency of the election, and into the qualifications as well as identity of the person elected. When the act of confirmation was to be performed, all persons were cited to appear and state their objections, if they had any, to the person elected. Such citation was in use from a very early period to the time of the statute in question, and has been in use ever since. I take it to be established, that at the time of passing the statute, confirmation was a udicial act. We now come to consider the provisions of that statute.

There would be no difficulty if the statute simply required the archbishop to proceed at once to confirmation, without waiting for authority from Rome, or allowing appeal to Rome. The act, whenever performed, would be, as it always had been, a judicial act. If the election was not confirmed, it was made void, and a new one would take place; and Roman interference would be shut out, in either case. The difficulty arises out of certain parts of the statute. The king, before this statute, used to send letters missive to the chapter, with the *congé d' élire*, but these were only recommendatory. The statute makes the election a mere form, because the chapter must not only proceed to election within a fixed time, but must elect the person named and no other. Has it the same effect on the confirmation? We are not, unnecessarily, to consider parliament as enacting a mere form, confessedly a solemn mockery. If confirmation is still a judicial act, the statute does not enact a senseless form — a mockery. The statute requires confirmation and consecration within twenty days, under a penalty. This had been relied upon as excluding the idea of a judicial examination, and possible disaffirmance. But it must be considered as meaning, unless lawful impediment exists. All penal statutes must be so construed. The object of fixing the time, was to ensure rapidity and prevent reference to or intervention from Rome, and not to prevent examination into the validity of the election and the canonical qualifications of the party elected, a course always pursued before, for which there are excellent reasons, and in which the public, and all sections of the church have an interest. This construction does not derogate from the prerogative of the crown, but does not extend it. It does not give the archbishop a veto on the prerogative, but continues to him the discretion to confirm according to ancient and established rules.

It is said that no refusal to confirm has been discovered since the passing of the

act. But instances have been shown at the bar, where inquiries have been held. It is true, the text-writers have spoken generally, as though the archbishop had no discretion; but the contemporaneous and subsequent construction of the parties most concerned, has been the other way, as the form of service shows. The non-user of the right to disaffirm or decide upon qualifications, may be from the necessity not having arisen before. No instance is shown of objectors being refused a hearing.

The parties were cited to appear, and having appeared, were refused a hearing. If they had a right to be heard, a mandamus is the proper remedy; and thus their case will become matter of record and of appeal. The nature of the objections they intended to make, and the character of the person elected, are not to be considered in the case. The question is, the right of objectors to be heard at all, whatever the objections: a question applicable to every confirmation.

Lord Denman. The writ of *mandamus* is the appropriate remedy in this case, and the question is, whether there is ground for issuing it. I admit, that there has been established a *prima facie* case of wrong. Parties are summoned to appear in opposition, and when they have appeared, their mouths are stopped at the very outset. This is an absurdity, exceeded only by the next act of declaring them contumacious for not appearing. This service is an anomaly, and reflects no honor on those who instituted it; but it does not constitute a case for setting aside a clear and established rule founded on a distinct act of parliament, and settled by invariable practice. Of whom is complaint made? In the first place, of a prelate entitled to the unbounded respect and confidence of all men — of that venerable primate of England, who has been a bishop during a quarter of a century, and archbishop nearly as long; who is distinguished for uprightness, moderation and circumspection; whose fine mind and understanding are not impaired by age, but matured by experience and reflection. The other authority, is a person whose learning and judgment are as well established as his character in other respects. The statute was intended to sever the connection with Rome, and at the same time to establish and perfect the mode of appointing bishops. Was such a king as Henry VIII. likely, at the same time that he deprived the pope of his veto, to give it to one of his subjects? The only answer made to this, is one I have heard with surprise and regret, because it contained a severe reflection on that great father of the English Protestant church, Archbishop Cranmer. I must say, I did not expect in this court, in the presence of so many learned lawyers, and of so many faithful sons of the church of England, to hear the name of Cranmer introduced for such a purpose. [His lordship then recounted several instances in the life of Cranmer, to show that he was not the obsequious servant of the king, which the remarks at the bar implied.] This manner of speaking of Archbishop Cranmer, shows there is a degree of excitement in certain quarters, which this court should take care not to be influenced by, and it has been the peculiar duty of this court, in all ages, to watch with peculiar jealousy the encroachments of ecclesiastical authority.

The arguments on either side rest on the meaning to be attached to the word "confirm" in the statute. It is to "confirm the election" that the command issues. The archbishop must be satisfied that an election has been duly made, and of the identity of the person. Can he go beyond this? What necessity is there for it, when the person elected went through the same ordeal when he was ordained deacon, and his election is an additional testimony to his character. The little time allowed between election and consecration is additional evidence that confirmation is not a judicial act. The election is a mere form since the statute, and so is the confirmation. The appointment is, in fact, in the crown. It is said that the term "confirm" had an established legal meaning at the time the statute was passed, and that this included an examination and right to receive charges. If this is so, a bishop elect is like a felon put upon his trial, with proclamation to all the world to come in and attack his character. But I am convinced that this practice never has existed authoritatively in this country. There is no trace of such a case on record.

It was argued that perhaps such a case never had occurred, because an appeal to this court might never before have been necessary. What, during all the centuries Christianity has existed, has not one person, whose opinions may have been alleged

heretical, been elevated to the bench of bishops? Has there been none elevated with "spiritual pride," none with "jealousies," none against whom some person or another might not have alleged some sort of "immoralities"? And, even if this were so, was envy dead? was faction dead during all that period? Where were the sons of Belial at that time — a class not extinct in these days, and who never fail to be forward in cases in which they take so much delight?

But, suppose opposers admitted, observe what would happen. "Come forth," saith the proclamation, "and offer your opposition in the case of this person to be made a bishop." The answer is, from one, "I knew this man at college twenty years ago, and I can tell you of some irregularities in his life." Another would say, "This person is justly suspected by one of having performed the service whilst in a state of inebriety." A third might charge him with "vanity." Another might throw a slur upon the chastity of his mother, or attack his conduct respecting his son. All that the Pharisee blessed himself in being free from, these people might falsely allege against the bishop. He might know all the allegations to be false and infamous; the archbishop might think the accusers utterly unworthy of belief, or know the charges to be false, but, nevertheless, the inquiry must proceed, and though they should be disproved, and the confirmation take place, still the fatal calumny must remain. But how much is the case strengthened when the charge is the unfathomable charge of heresy, supported by extracts from books, probably little understood, and by reported conversations, probably imaginary, and, if real, difficult to be correctly repeated? Thus the life of a bishop might be frittered away whilst proceedings are pending against him, and his see might be left without any occupant, to the detriment of the church and of the people.

There has been, in fact, only one exception to the rule of the non-appearance of opposers, and that exception was in the case of Bishop Montague, when the vicar-general, Dr. Rives, refused to hear an opposer, guarding himself, however, by stating that he did so because the opposition was not in writing. Of this Dr. Rives we know little, and that little not much to his credit; but it is very clear to me that if he did give such a judgment, he was wrong; for in the law nothing is said about the opposition being in writing, and, indeed, it might proceed from a party who is not able to write.

Every one has heard in this present case of the celebrated protest addressed by thirteen or fourteen bishops. The arguments they urged were arguments of great weight and power, but, though they warned the Minister of "scandal" arising from the nomination, not once did they allude to rejection of the prelate at confirmation on the ground of heresy. One of the objectors urged that the dean and chapter ought not to be exposed to the perils of a *præmunire*, but there was no assertion of the danger and disgrace so likely to arise from any opposition at the confirmation at Bow Church. Such a process was not hinted at.

It has been said that, by not allowing the court to inquire, the archbishop would be converted into a mere "machine." That word "machine" suggested to me the idea that the writ of this court might possibly be required to be used as a "machine" — a machine with some sort of galvanic operation upon powers hitherto supposed to be extinct, which would make some convulsive motions for the space of twenty days, and then relapse into the most profound repose. But that idea implies that the forms in which vitality is to be generated had at one time an existence. I do not believe that to have been the case.

The duty of the archbishop in the matter appears to me to be clear, and entirely apart from the functions of a judge. It is, in my opinion, more analogous to the duty of a returning officer at elections. His confirmation is necessary. If his inquiries lead him to the opinion that the appointment would be injurious, he can remonstrate. He can advise the crown not to issue a *congé d' élire*. He may ask to be removed from the painful position of performing or ordering to be performed, the duty of consecration after the election has been made. Even then he may still resort to the presence of the sovereign, and pray to have the *congé d' élire* and the letters missive superseded. But even at the worst, if the crown persists in nominating the person to be bishop, and if he is quite clear that the *congé d' élire* ought to be set aside, he may

act as his conscience doubtless would dictate, and as some of his predecessors, and some of the judges of this court, have acted — he may resign.

The present archbishop, I have no doubt, would do so after hearing the objections that were made to Dr. Hampden, if he did not consider that he would not be justified in such a course of proceeding. I ask whether it has been the opinion of any person, until within the last few weeks — until this unfortunate controversy occurred, which has so inflamed the public mind — that the archbishop had a veto on the appointment of the crown to a vacant bishopric? And when I hear Sir F. Kelly entreat, with the solemnity of manner peculiar to him, that we would not call upon the archbishop to invoke the Almighty in prayer, and perform as a sacred ceremony that which is in reality a mockery, a shadow, and at best a useless form, I confess that I hardly know how to meet such an observation. Are, then, the dean and chapter to be treated as nothing? Do they conduct their proceedings without prayer and solemn ceremony? And if they are required, notwithstanding, to proceed to the election, without the power of refusing to elect the nominee of the crown, why should all this declamation be referred only to the confirmation, and not the election? It may be an ill-considered and an impious act of parliament, and one, perhaps, that ought to be repealed; but why there should be any objection made to the solemn ceremony of the confirmation and not of the election, which is conducted with equal solemnity, and both of which are in conformity with the act of parliament, I cannot understand. It reminds me of the two Roman augurs who were said never to meet each other without laughing; and it certainly does appear to me that, if the court yielded to the request of the learned gentleman on such a ground, the advocates on both sides would have good occasion to laugh at its decision.

Having stated my reasons for the opinions which I deliberately, firmly, and conscientiously entertain — that what was contended for in support of the rule never has been at one time the law of England — I must say that I think the court is bound to refuse the writ of mandamus. At the same time, I may state that I have had the greatest possible hesitation in coming to this conclusion; and the more especially as I feel that this is a refusal of an inquiry which, in a railway or any other ordinary case, would at once be granted. My opinion is so strong against making such a rule absolute, and so entirely unchanged by what I have heard this day, notwithstanding that I feel the greatest disposition to show the highest respect for the sentiments of my learned brethren who differ from me, that I cannot possibly say that this writ ought to go. I think, if it went, it would be good for nothing, for the return which would be made to it would be a sufficient answer. But I am also bound to consider the consequences which would arise from the issuing of such a writ, viz., the frightful state of theological animosity which it would create and perpetuate for a period of perhaps, two years, and the sanction it would give, upon the avoidance of every see, to the adoption of a similar course, where the archbishop would be called on to summon all mankind, in every case, as objectors to the appointment of the crown, and keep open a court which, in fact, might never be closed. It must also be borne in mind that the court has a discretion in the issuing a mandamus, supposing even it thought that the proceeding complained of was of a judicial character, and that the archbishop might be compelled to hear the objectors; and in the exercise of this discretion, without regard to the legal right, I feel bound to refuse the writ. I must also acknowledge that some deference is due to the exalted person who is the defendant in this case, as well as to Dr. Hampden himself, whilst more regard is to be paid to the safety of the church and the peace of the state, which I verily believe would be perilled by the smallest doubt as to the true meaning and intention of the act of Henry VIII. I repeat that I have the greatest respect for the opinions of my learned brethren. I think this is a question which ought to have been discussed. The balance of convenience certainly appears to me to be in favor of discussion. I must say, in reference to my brother Coleridge's admirable argument, that it only confirms me, as to the danger of exposing the clear construction of acts of parliament to those who would bring down their forgotten books, and wipe off in this court the cobwebs from decretals and canons, of which they know nothing. For these reasons, and thinking myself bound by the act of parliament and the practice which has prevailed, I think the rule must be discharged.

The court being equally divided, no writ was issued.

We have not followed the learned judges in their citations from the canon law and acts of parliament, but have given the results to which they came. In other respects we have presented the opinions, as far as is possible for an abstract, in the very words of the judges. The opinions of justices Patteson and Coleridge in favor of the motion, and of justice Erle against it, are lawyer-like, learned, and to the point. That of Coleridge, J. is the most learned and elaborate; but he notices the bearings of the case on the topics of the day, and its history, rather more than is strictly judicial, but not in a manner that is otherwise exceptionable. Mr. Justice Patteson confines himself rigidly to the straitest duty of a judge; and the same may be said, with a slight exception, of Mr. Justice Erle. As to the chief justice, we have only to say, that unless the reporters on both sides have conspired to libel his lordship, the style and temper of his opinion are of a kind to do him and the bench no credit. Full one third of his opinion is devoted to irrelevant topics, discussed in an excited manner. He rebukes with great severity learned counsel who applied the term "obsequious" to Cranmer, although the character of Cranmer threw light upon the history of the statute, and was relevant to the argument. The character of Cranmer is an admitted problem in history, and the majority of writers agree with the learned counsel. Hallam, as decided a whig as Lord Denman, sums the matter up well, when he says that had the enemies of Cranmer been satisfied with attacking his character, it would have been difficult to defend, but they gave him the benefit of martyrdom. His lordship and his learned brethren and the counsel at the bar, said what they pleased of Cranmer's sovereign, and his lordship cut right and left at the characters of prelates and commentators cited at the bar, and pretty plainly called the objectors "sons of Belial," and made an undignified fling at the canonical learning displayed by his brother Coleridge; but counsel are brow-beaten for expressing an opinion of a prelate who lived nearly four hundred years ago, an opinion relevant to the argument, and in which the majority agree with him, because it offended the political and theological prejudices of his lordship. The truth is, the character of Cramner, like that of William III., is one of the tests

of whigism. The counsel was rebuked, too, for expressing this opinion "in the presence of so many faithful sons of the church of England." Is it a rule in England, that counsel are to say nothing to offend the feelings of "faithful sons of the church of England," faithful in the whig sense of the term? Some of his lordship's arguments seem to us singularly weak. He asks, what need can there be of examining the qualifications of a bishop, since he had been examined when ordained a deacon? as though a man might not be qualified for a deacon and not for a bishop, and as though the character and opinions of a man might not alter in the course of twenty or thirty years.

It was the misfortune of Chief Justice Denman that he was borne forward on the high current of political excitement, a partisan whig of the Harry Brougham school, earning his chief distinctions in political and party questions. In the case of the *Queen* v. *O'Connell*, the side judges of the Westminster courts, men removed almost entirely from political connections, were all but unanimous in favor of the indictment. In the house of lords, the casting vote lay with Lord Denman, who gave an opinion, contrary to that of the judges, in favor of the position taken by the whig party. We believe we are not wrong in saying that that decision has been referred to, here and in England, rather as a party vote than as a judicial determination. So will it be with *The Queen* v. *The Archbishop of Canterbury*, so far as it is a decision at all. On the main question, whether the objectors had a right to be heard, his lordship may be right or he may be wrong. The court was divided. But that there was ground for issuing the writ seems to us beyond question. The single fact that the judges were divided in opinion on the main question, was enough. The practice was stated from the bar and the bench, and admitted by his lordship, to be in favor of issuing the writ in all cases where there was not a clear practice and unanimous opinion against the petitioners. His lordship admitted that the petitioners made out a *prima facie* case of wrong, and that a writ would have issued under these circumstances, had this been a railroad case, or any other case of property. He distinctly assigns reasons of discretion for refusing the writ, "the theological animosity it would create," "the deference due to the exalted person who

is defendant, and to Dr. Hampden," the "peace of the church," and "the danger of exposing acts of parliament to the construction of men who cite decretals and canons of which they know nothing." His lordship also furnishes us the first instance in modern times of a judge casting a slur upon the opinion of a brother judge, just delivered in opposition to his own.

This case shows how extensive is the prerogative for which the whigs of this hour are the great advocates, and how subject is the position of the church. The whigs sustain the prerogative, because it, in fact, lies with the minister and depends on a majority of the house of commons. The tories and high-churchmen oppose it, because it subjects the church to the prime minister. The people are rather in the habit of crying out in favor of political when pitted against ecclesiastical privilege; but it seems to us that in this case the interests of popular liberty, and the purity and efficiency of the church, are better secured by making the bishops elective, and giving every citizen the right to show cause against their confirmation. There is little doubt that parliament will soon lay hands on the whole question, and either restrain the prerogative or abolish the formalities of election and confirmation.

Recent American Decisions.

Circuit Superior Court of Law and Chancery, of Virginia, September Term, 1847.

STEWART *v.* STEWART'S EXECUTOR.

In those states where a scroll is allowed instead of a seal, no distinct recognition need be expressed upon the face of the instrument, that the writing was sealed by the party who signed it.

THIS case was argued by *F. B. Barton* and *William L. Barton*, for the plaintiff, and *John L. Monye*, for the defendant.

LOMAX, J. The court will, for the present, confine its attentions to the questions raised on demurrer.

The plaintiff's fourth count declares, generally, in the usual

form upon a bond, sealed with the seal of the defendant's testator, making *profert*, &c. The fifth count declares that the testator

"in his lifetime made his certain other writing obligatory, sealed with his scroll, which the intestate then and there intended as his seal, and acknowledged to be his seal,"

making *profert*, &c. The defendant craved *oyer* of said supposed writing obligatory, which was read in these words:

"Know all men by these presents, that I, John Stewart, of the county of Spotsylvania, am indebted to James Stewart of said county, in the sum of five hundred dollars, for his services with me ever since the said James Stewart was of age (his rates are at one hundred and twenty-five dollars per year); in case of my death, the said James Stewart shall not be defrauded out of his money, neither shall this bear interest till paid. In witness my hand, this 23d day of June, 1817.

JOHN STEWART. [*A Scroll*].

Attest, ROBERT STEWART,
SALLY M. STEWART.

The defendant thereon demurs generally to both counts, assigning as cause of demurrer to the former, that there is a variance between said fourth count and the writing read, in that the note or writing read to him, and above set forth, is not an instrument under seal, or writing obligatory, as alleged in said fourth count, but a simple contract, promissory note, or agreement without seal. And in the demurrer to the fifth count, the cause set forth is, that there is a variance between said fifth count and the instrument of writing read to him, in this, that said instrument is not a writing obligatory, bond, or sealed instrument, but a note in writing, simple contract, promissory note, or instrument without seal.

If the demurrers be sustained, it must be upon the principle that no proofs nor averments, though the averments be, upon the pleadings, admitted to be true, can show that the scroll was affixed, by way of seal, to give the instrument the effect of a writing obligatory, and the instrument must conclusively show in the writing upon its face, either expressly, or by necessary implication, without the aid of any extraneous matter, that the scroll was affixed as a seal, with the purpose of executing a writing obligatory. If extraneous proof be admissible, then the demurrer to the fourth count would preclude the opportunity of offering such proof, which would properly fall within the province of a jury, and might be fully tried upon a plea of *non est factum*, and if admissible, then the demurrer to the fifth count,

in which all the essential matter of proof is averred, has admitted the averments to be true.

The act of assembly declares, that any instrument to which the person making the same shall affix a scroll, by way of seal, shall be adjudged, and holden to be of the same force and obligation as if it were actually sealed. 1 Rev. Co. c. 128, § 94. As has been remarked by Cabell, J., in the court of appeals, the statute has not laid down any rule of proof to ascertain that the scroll was affixed to the instrument by way of seal.

It might seem, from expressions in the opinions of some of the judges in the court of appeals, in regard to scrolls, that the doctrines respecting the recognition of the scroll upon the face of the instrument, has originated altogether in the practice of substituting the scroll for the seal, and that where a real seal was used, no question about such recognition could be raised; with great deference, however, to those opinions, it is respectfully suggested, that there is equally room for this question, in the case of seals, as in the case of scrolls. For, as will appear in the English authorities hereafter referred to, the same, or similar questions have been raised as to the effect of seals. The act of assembly would seem to place both upon the same ground, in every respect, and the same rules which ascertain that the wax was affixed by way of seal, will equally ascertain that the scroll was affixed for the same purpose, and with the same effect. It would seem most proper, therefore, in the consideration of every question in regard to scrolls in Virginia, that we should be guided by the analogous practice, under the English law, in regard to the wafer seals.

The junior counsel for the plaintiff, whose argument in this case afforded much satisfaction to the court, has stated that he has, after the most diligent search, found no case where the question as to the sufficiency of the sealing of an instrument declared upon as a writing obligatory has ever been raised in the shape of a demurrer, after oyer taken of the instrument. It would seem very clear, that unless the instrument which is averred in the declaration to have been sealed, which averment the demurrer would seem conclusively to admit, shall, upon being read to the defendant, plainly show, by legal intendment, and independent of all proof whatever, that the writing could not have been sealed, a demurrer could not be proper; and

that the plea of *non est factum*, which would embrace all the matter of law, together with the matter of fact, should be resorted to. It is stated as the reason for the rule requiring profert of deeds relied upon in pleading, " that it is the proper office of the court to judge of the sufficiency of them, to see that they are duly executed, and without erasure or interlineation, and whether they are absolute, conditional or revocable." Bac. Abr. Pleas & Pleading, Pl. in Bar, § 12, 13 ; Vin. Abr. p. 66, M. ; sed vide Step. Pleading, 439 ; 3 Ibid. App. 180 ; also 1 Reev. Hist. Eng. Law, 248 ; 2 Ibid. 259 – 330. Nevertheless, that rule has never been construed so as to confound the lines which separate the respective functions of the court and the jury, and to make that matter of law for the adjudication of the court which ought to be tried by the jury ; nor to make that the subject of a demurrer, which is the proper subject of a plea. Though a rasure or interlineation were visible upon the instrument of which profert is made, advantage could not be taken of that objection by demurrer, especially if the allegations in the declaration had set forth the contract as it would have read, if written out without any erasure or interlineation, whilst the court cannot say that there may not be cases where demurrer upon oyer of the supposed writing obligatory may not be the proper mode of making objection to the insufficiency of the sealing, yet it is of opinion, that such a mode of proceeding, unless under very peculiar circumstances, does not derive any aid to sustain it, from the reason of the rule which has been alluded to, requiring profert. The case of *Jenkins* v. *Hunt*, (2 Randolph, 246,) does not, according to the report of it, touch the present case ; for although the writing on which the action was brought, was a writing with a scroll, with " seal " written within it, concluding " witness our hands," and with a penalty double the debt, yet it would seem that it had been described in the declaration, not as a writing obligatory but as a " writing signed with the proper hand," &c. The decision of the court was, that it was a fit subject of demurrer to the declaration, that the plaintiff should in an action of debt upon a writing not averred to be sealed, and treated by him as a simple contract merely, have claimed and have recovered a penalty, which is not recoverable unless created by a writing obligatory. In all the cases which have been decided by the court of ap-

peals, in regard to the effect of the scroll to constitute a writing obligatory from the case of *Jones* v. *Logwood*, (1 Wash. 42,) down to the case of *Parks* v. *Recolett*, (9 Leigh, 511,) and the subsequent case of *Pollock* v. *Glassell*, (2 Gratt. 439, inclusive,) it will be seen, that the question as to the effect of the scroll, was in every case raised, not by demurrer to the pleading, but upon exception to the evidence, which consisted merely of the writing with the scroll affixed, without any auxiliary or additional evidence whatsoever. See *Baird* v. *Blassone*, (1 Wash. 170); *Austin's Adm'r* v. *Whitelock*, (2 Munf. 487); *Anderson* v. *Bullock*, (4 Munf. 442); *Peaseley* v. *Boatwright*, (2 Leigh, 195); *Buckner* v. *Mackay*, (2 Leigh, 488); *Cromwell* v. *Tate's Ex'rs*, (7 Leigh, 301); *Tenterville* v. *Bernard*, (7 Leigh, 302, note.) Nor was any offer made of further testimony as to the scroll, to show the purpose with which it was affixed. If the requisite, to constitute a deed, of sealing, like the other requisite of delivery, involves any consideration of fact, the defence should in the one case and the other seem to rest upon plea, or on proofs at the trial, rather than on demurrer. It may be admitted that according to the current of decisions in Virginia, the instrument on which this action is brought is not *per se* a writing obligatory. But those cases have none of them gone to the extent of deciding that the instrument must conclusively show upon its face that the requisites to constitute it a writing obligatory, have entirely and in the minutest circumstances been observed, and that as a mere matter of law upon a demurrer, all collateral and auxiliary proof to sustain the requisite of sealing is inadmissible, and must be excluded. In this aspect of the case, the question is a new one, in the consideration of which the court has no express authority in Virginia to direct or control its judgment.

Where upon the face of a written instrument there is seen affixed to it, at the time of its execution a scroll, precisely in the position usually occupied by seals, to constitute the writing a specialty, it does seem, upon the rules of simple and inartificial evidence, that there is a strong legal presumption that the scroll was affixed there by way of seal, or a waxen impression. The same rules would lead to the same presumption where the waxen impression was affixed to the instrument. In modern

times the scroll or seal is affixed to the signature of the party to be bound by the contract, although the signature may be unnecessary to constitute the specialty. If everything upon the face of the instrument is to be resorted to, to speak the purpose of the parties, the irresistible presumption would seem to be, that an additional sanction was designed to be conferred upon the instrument, such as the law usually understands the solemnity of a seal to express. The signature alone would be sufficient to make the contract binding in all its force; when to that signature, contemporaneously with it, has been affixed a seal, why should the courts reject that seal as an unnecessary appendage, when they are called upon to give effect to that contract, as the parties intended it? Does it not seem that the act of the parties, in affixing the seal, should speak as strongly as any language can speak in the body of the instrument, or in the formal attestation to the writing? If any meaning can be gathered from that act, why should it not be allowed to speak its meaning as significantly as any formal words that may be written upon the instrument? Nevertheless, we find it laid down as ancient authority, even in the case of an instrument sealed with wax, that "if in a deed no mention is made of sealing, it is not a good deed, though sealed in fact, if these words *sigillum apposui*, are wanting." 13 Vin. Abr. Faits, H. pl. 9, for which is cited Br. Abr. Faits, pl. 76–103, referring to the Year Books. It seems, however, from Viner's marginal note, that the authority cited has in another place (Br. Abr. Obligation, pl. 8,) made it a quære whether the *sigillum suum apposuit* be material. It would seem an over-refined distinction, for which some countenance appears to be given in the authorities as stated in Viner, between *apposui*, in the first person, and *apposuit*, in the third. Although this authority in regard to seals was not referred to, in the court of appeals, upon the subject of seals, yet those adjudications seem to have a striking conformity to it. In later authorities in England, we find, however, that the law is thus laid down. "A deed is good, albeit these words in the clause thereof, *in cujus rei testimonium sigillum meum, apposui*, be omitted; and albeit there be no mention made in the same deed, that the deed was sealed and delivered; so as in truth it be duly sealed and delivered, and the sealing and delivery be proved." Preston's

ed. of Shepherd's Touchstone, 55 ; 30 Law Lib. 119 ; Co. Litt. 2, 5, 5, 117 ; Dyer, 28 ; Perk. § 120 ; Co. Litt. B. 2 ; Thos. Co. Litt. 241 – 243 ; 7 Bac. Abr. Obligations, C. The utmost that can be inferred from this last cited doctrine, is, perhaps, that the instrument, though a seal be affixed to it, will not of itself be a deed, without an express recognition in the obligation that it was sealed, although the mere seal, without such recognition, may not be sufficient of itself to constitute the writing a specialty ; yet the doctrine as stated opens wide the door for the admission of evidence, and rests the sealing in the same manner as the other requisite of delivery, upon proof to sustain the instrument as a deed. It was thus in *Clement* v. *Gunhouse*, (5 Esp. R. 83,) in an action of *assumpsit* for seaman's wages, where the defendant insisted that the shipping-articles produced by himself, to which the parties, as stated in the articles, "had set their hands," and which the parties had signed with a seal after each name, was a deed upon which the action should have been brought, and assumpsit would not lie. Chambre, J. held that the putting a seal opposite the name, though *evidence* of a deed, as one of the formalities belonging to it, was not to be taken as *conclusive*. That if the parties did not *mean* to contract by deed, the ignorance of the parties as to the effect of the seal could not make it so, and he relied upon the words of the articles "to which the parties have set their hands," from which he inferred that it was not the intention of the parties to execute a deed. The foundation of the inference in that case was undoubtedly strengthened by the consideration that it is unusual for shipping-articles to be sealed, and it would be an injury to the seaman, inasmuch as the seal would deprive him of his option to sue in the courts of admiralty. In that case, no evidence was offered in regard to seals besides the articles themselves, which the defendant introduced on his part with the seals as an answer to the action which the plaintiff had chosen to bring. It is obvious that it was a question of evidence, and was so treated by the judge, who regarded the seals as not conclusive, whilst he relied upon the form of the conclusion of the instrument (which it is admitted is the same as the conclusion of the writing now under consideration) as evidence of an intention not to execute a deed. The farthest that that decision goes, is that the seals were not conclu-

sive in that case; but it does not decide that evidence to make them conclusive was inadmissible, nor does it intimate that the expression "to which the parties have set their hands" should absolutely control the fact apparent upon the articles, that a seal was affixed. It puts itself upon the ground that the parties might not, upon the circumstances developed, have meant to contract by deed, but does not decide that it could not be shown by admissions on other proofs that the parties did so mean; it does not exclude proof of their intention, as a matter of fact to be elucidated by further proofs.

The recent case of *Parks* v. *Hewlett*, (9 Leigh, 511,) shows, that the character of a writing to which a scroll is affixed does not depend conclusively upon the express recognition of the scroll as a seal, in the contract of the parties. The attesting clause of the instrument subscribed by the witnesses declared in that case that the instrument was sealed, a circumstance, it is true, which does not exist in the present case. Like the present it concluded with "witness my hand." Two of the judges in that case relied much upon the circumstance, that it appeared from the attesting clause that the instrument was sealed. But Parker, J. placed the doctrine upon much broader grounds, and President Tucker manifested his concurrence with him, by saying, that that part of the case had been so satisfactorily disposed of by his brother Parker, that he himself had nothing further to say, except to declare his concurrence with him in the result to which he had come. The opinion of Parker is able and convincing. He contended that the common law does not require that the party should anywhere in the instrument speak of a seal, but only that it *be* sealed, and the sealing proved; relying for this common law principle upon Sheppard's Touchstone, before referred to. He considered scrolls, as placed by the law of Virginia, precisely upon the same footing as seals, when the scrolls were affixed by way of seal, and he held it clear that it might be proved that the scroll had been so affixed without mention of it in the body of the instrument; referring to Chief Justice Tilghman's opinion in *Taylor* v. *Glassell*, (2 Serg. & Rawle, 504.) Whilst there must be seal or scroll, and some recognition of it in the body of the instrument, or some evidence of it *aliunde*, it could never be maintained, he said, that such evidence, whether by

the proof of witnesses, or acknowledgment of the party, would not supply the place of such recognition. If the maker, he remarked, says merely "witness my hand," if the attestation of the witnesses takes no notice of the sealing, if there are expressions in the instrument not usually found in deeds, but common in simple contracts, as if it commence, "for value received," &c., all these are circumstances, (and there may be others) affording strong presumptive evidence that the party did not intend to bind himself by deed, and has not so bound himself; when some of these circumstances exist, and especially when all concur, they may outweigh the *mere* circumstance of a scroll being annexed, which might be so easily placed there after the execution of the writing. But this presumption, like any other, may surely be rebutted by proof of the fact that the scroll *was* annexed by way of seal, and by the maker. He, moreover, maintained, that when the cases in the court of appeals before that time decided, were carefully examined, they were not inconsistent with the opinion which he was giving. He then proceeded to give a general view of those cases, and made the same remark upon them, which has been hereinbefore made, that in not one of them was there any proof that the instrument had been actually sealed, or scrolls annexed by way of seal. The sound sense displayed throughout the whole of this opinion of Judge Parker commends it most strongly for the adoption of this court. In that case evidence *aliunde* as to the purpose of the scroll was admitted, and was relied upon, not only by that judge, but was also referred to by Judge Cabell, and apparently sanctioned by the concurrence, which President Tucker expressed in the opinion of Parker.

In the case of *Pollock* v. *Glassell*, (2 Gratt.) Baldwin, J. in the able opinion which he delivered, maintained that by the common law a deed is good though no mention of the seal be made in the instrument, and he adverted to the doctrine of the cases in the court of appeals, upon the subject of scrolls affixed to contracts, and he remarked, that in no case has it yet been held that, in the absence of such recognition (of the scroll as a seal upon the face of the instrument) evidence is inadmissible to prove, that in fact the scroll was affixed to the instrument, with intent that it should stand in the place of a seal.

It may be held then to be clear, that though there be no

recognition of the seal, or of the scroll upon the face of the instrument, yet both, according to English law and the law of Virginia, it is a matter of proof *aliunde*, that the instrument to which the wax was annexed, or the scroll affixed, was meant by the parties to be a sealed instrument, and was, in fact, a sealed instrument.

In England, where a seal of wax has never been dispensed with, in an action on a bond executed in Jamaica, where bonds according to the custom of that place may be executed by a mark with a pen, of a particular kind, in the place where the seal is usually affixed, and the declaration being in the usual form on writings obligatory, the court, upon plea of *non est factum*, admitted evidence *aliunde* of that custom. *Adams* v. *Ker*, (1 Bos. & Pul. 360.) The furthest the courts have gone to invalidate such seal or scroll, where there was no such recognition, has been to require proof in aid of the seal or scroll, to constitute the instrument a deed; with this qualification there seems to be but little ground for the fears expressed by some of the judges, as to the facility with which a scroll might be marked by the pen, after the execution of a writing as a simple contract. The burden of proof, which the doctrine, with the qualification, would impose upon the party suing upon the contract, in which there had been no recognition of the scroll, to show, that at the time of execution the scroll was, in fact, affixed by way of seal, would seem to close the door against the dangers apprehended.

If, then, the instrument, declared upon in this case, is not conclusive as to its character of a writing obligatory, because the sealing by affixing a scroll, was not acknowledged upon the face of the writing; and if, notwithstanding that circumstance, the scroll, as a seal, may be proved by evidence *aliunde*, what is the effect of the demurrer to the fourth count? That count alleges that the writing, as a writing obligatory, was sealed with the seal of the defendant's testator." Is there any contradiction of that allegation, or any unnecessary inconsistency to destroy that allegation, and make it of no effect, because he makes profert of a writing having merely a scroll affixed to the signature? May he not be able, though the instrument may not on its face have the conclusiveness of estoppel as to the sealing, to show by evidence *aliunde* that the scroll was affixed by way

of seal, and that the parties intended the instrument for a deed, when it was executed? With such proof, does not the instrument become, upon the doctrines which have been stated, that which it was alleged to be, — a writing obligatory sealed, &c.? If the demurrer has the effect then to admit the matters alleged to be true — all that are susceptible of proof — the defendant precludes himself from objecting that the instrument was not a sealed instrument, as it was expressly described. It would seem reasonable that the court should, upon inspection of the instrument, make every legal intendment to sustain the instrument as a sealed instrument, as the parties have mutually in the description of it alleged and admitted it to be. Upon these considerations the court is of opinion that the demurrer to the fourth count should be overruled.

If any doubt could be entertained as to the fourth count, none whatever could be in regard to the demurrer to the fifth. In that count, it is averred that the testator made his certain writing obligatory, sealed with a scroll which the testator then and there intended as his seal, and acknowledged to be his seal. The evidence *aliunde*, to show that the scroll was affixed by way of seal is here distinctly thrown into the form of averment in the pleading, and the demurrer is to be taken as admitting the averment to be true. In some of the states of this Union the common law sealing is still required in writings obligatory; whilst others, by force of legislative or judicial authority, have adopted scrolls in the place of waxen impressions. 4 Kent Com. 452, note. In Alabama, it is understood that neither is requisite. There can be no question that a writing obligatory, with whatever solemnities it may be executed, according to the *lex loci contractus*, may be sued upon as a writing obligatory, in every other state. It is not known whether the practice in framing the pleadings upon these writings obligatory when they differ from the requisites for such writings in the courts of the state, where the suit may be depending, has undergone any modification, whether as in the declaration on the Jamaica bond, in *Adams* v. *Ker*, the writing may be declared upon generally as a writing obligatory, reserving the question of the *lex loci contractûs*, for the trial of the issue, upon the plea of *non est factum*, or it is required to be declared upon specially, with averment, that according to the law of the

place where it is executed, it has the effect of a writing obligatory. But whether the courts of each state are bound to know the laws, or at least the statute laws, of the other states, without averment of what those laws are, or it be required that those laws shall be averred, it would seem unquestionably clear, that if such averment be made by the plaintiff and admitted by the defendant, in the form of a demurrer, or in any other form, to be true, the court would be saved from any inquiry upon that subject, and its judgment must be pronounced as upon an ordinary writing obligatory. Buller, J., in *Master* v. *Miller*, (4 T. R. 439,) commenting upon the doctrine as to the effect of accidental destruction of a seal to a deed, remarks, "And in these days, I think, even if the seal were torn off before action brought, there would be no difficulty in framing a declaration, which would obviate every doubt upon that point, by stating the truth of the case."

The averment of extraneous facts, consistent with the instrument, in order to give it effect as a deed, it would seem reasonable to regard, as having the same effect, whether that matter applied to the execution of the instrument, or to its restoration to its proper character, as a deed. Upon these considerations the demurrer to the fifth count must be overruled.

There is no mode conceivable in which the declaration could have been framed, but as it has been framed, in the fourth and fifth counts, upon such an instrument as that now before the court. If the demurrer to both of them were sustained, it would effectually preclude the evidence *aliunde*, which the court of appeals has decided in *Parks* v. *Hewlett*, and *Pollock* v. *Glassell*, is admissible in such cases, and which no case in that court has been expressly or by any necessary implication, decided to be admissible.

Judgment for plaintiffs.

Supreme Judicial Court of Maine, April Term, 1848.[1]

Pierre *v.* Fernald.

The owner of a house, in which windows have been opened for twenty years, upon the side adjoining the defendant's land, acquires no presumptive privileges of light and air, if during part of the time, he has hired the defendant's premises.

There must have been something resembling an *adverse* enjoyment of the privileges claimed.

Whether the English doctrine respecting the privileges of light and air is to be received in this country, — *Quære?*

This was an action on the case to recover damages for the obstruction of the natural flow of light and air, to two windows opened upon the north-east side of the plaintiff's dwellinghouse in Portland. The house was built in 1823. The north-east side was upon the line, which divided the lot upon which it was erected, and then owned by Henry Titcomb, from the lot then owned by Robert Ilsley, and now owned by the defendant. Its north-east corner appeared to have been placed a few inches upon the lot now owned by the defendant, then unoccupied, and which remained unoccupied till 1831, when George Pierson, then the owner, built a shop upon it. That shop appeared to have been placed two and a half or three feet from the north-east end of the plaintiff's house, and was about as high as a fence erected by the defendant, in 1844, when the shop was removed. The fence was built upon the defendant's lot, and within three or four inches of the back window, and about twelve inches of the other window in the end of the plaintiff's

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[1] The supreme court of Maine commenced its law term in Cumberland county on the second Tuesday of April. This was the first term in the county holden under the law authorizing the appointment of a new judge. The whole court were present, consisting of Chief Justice Whitman, and Justices Shepley, Tenney, and Wells. They devoted a fortnight, with ceaseless diligence, to the despatch of business. It was with melancholy interest, that the bar remembered that this was the last law term, which the learned and venerable chief justice would hold in the county. Having presided in this court and the court of common pleas for twenty-six years, with a dignity and impartiality, rarely equalled, he will this year, by the expiration of his constitutional term, retire from the bench. The lessons of sound juridical knowledge, clear practical wisdom, and impartial justice, which have so long flowed from his lips, giving force to truth and confidence to virtue, will never again be heard. May his successor prove equally worthy of the civic crown of integrity and wisdom!

The reports published in this number have been prepared by an eminent member of the bar of Maine, and are entitled to perfect confidence.

house, and so high as materially to obstruct the admission of air and light. The plaintiff hired the shop with the land back of it and around it, paying rent therefor, from 1835 or 1836, until July, 1844, when the defendant purchased.

Shepley, J. The first question presented is, whether the English doctrine respecting the obstruction of light and air is to be received as law in this state. The origin and principles of the law in relation to the presumption of grants were considered in *Nelson* v. *Butterfield*, (21 Maine R. 234,) and it is unnecessary to repeat what is there stated, or to refer to the authorities there cited. The principle upon which the presumption of grants and other contracts for the security of rights and easements rests, comes to this, that if any one, knowingly, permits another, for a long course of years, and without molestation, or interruption, to claim and enjoy rights, easements and servitudes, injurious to him, or his estate, it cannot be satisfactorily accounted for, according to the rules of human experience and the known motives of human conduct, except by supposing that it was authorized by some grant or agreement. If the enjoyment has existed by consent or license of the party injured, no such presumption can arise. Consequently an *adverse* claim and enjoyment must be proved. *Beaty* v. *Shaw*, (6 East, 208); *Gayetty* v. *Bethune*, (14 Mass. 49); *Sargent* v. *Bullard*, (9 Pick. 251); *Pinkham* v. *Arnold*, (3 Greenl. 120); *Colin* v. *Barnet*, (17 Wend. 564.) In the last case, Mr. Justice Cowen says, "all the cases which have considered this defence are at least uniform in one thing, that it must combine not only continuity, and a peaceable possession, without the hindrance of the owner in respect to whose land the easement is claimed; but, in complete analogy to its archetype, the bar in ejectment, the possession must appear to have been adverse."

Nothing in the law can be more certain than one's right to occupy and use his own land as he pleases, if he does not thereby injure others. He may build upon it, or occupy it as a garden, grass-plat, or passage-way, without any loss or diminution of his rights. No one else can acquire any right or interest in it merely on account of the manner in which he has occupied it. If one builds upon his own land, immediately

adjoining the land of another, and opens windows overlooking his neighbor's land, he exercises no more than a legal right. This is admitted in *Cross* v. *Lewis*, (2 B. & C 286.) In the exercise of a legal right, he cannot encroach upon his neighbor's rights, nor impose any servitude, nor acquire any easement by the exercise of such a right for any length of time. He does his neighbor no injury by the enjoyment of the flow of light and air, and does not therefore claim or exercise any right adversely to the rights of his neighbor. Nor is there any similitude between the exercise of such rights, and of rights claimed adversely.

It is admitted in the English cases, that a neighbor, under such circumstances, suffers no injury, which is remediable by any legal process; in other words, his rights have not been encroached upon, nor has he any just cause of complaint. Yet, after being in this situation for more than twenty years, he forfeits his right to the free use of his land, because he did not prevent others from enjoying that which occasioned him no injury, and afforded him no just cause of complaint. The result of this doctrine is that the owner of land, not covered by buildings, but used for any other purpose, may lose his right to build upon it by reason of the lawful acts of the owner of adjoining land, performed upon his own premises, and continued more than twenty years. It may be safely affirmed that the common law contained no such principle. The doctrine, as stated in more recent decisions, appears to have grown out of the misapplication (in England) of the principle enforcing the acquisition of rights and easements by an adverse claim and enjoyment for more than twenty years to a case in which no adverse or injurious claim was either made or enjoyed.

This doctrine has been examined, and its fallacy exposed, in *Parker* v. *Foote*, (19 Wend. 309.) Mr. Justice Bronson very justly remarked, "it cannot be applied to the growing cities and villages of this country, without working the most mischievous consequences. It has never, I think, been deemed a part of our law. Nor do I find that it has been adopted in any of the states. It cannot be necessary to cite cases to prove that those portions of the common law of England, which are hostile to the spirit of our institutions, or which are not adapted to the existing state of things in this country, form no

part of our law." Chancellor Kent says this common law right of prescription in favor of ancient lights does not reasonably or equitably, and it is not the intention of owners of city lots, that it should ever be applied to buildings on narrow lots in the rapidly growing cities of this country. 3 Kent's Com. 446, note *b*. In *Atkins* v. *Chilson*, (7 Metc. 403,) it is stated that the tendency of decisions in that commonwealth (Massachusetts) has been favorable to a reception of the English doctrine, but there is a distinct statement (p. 404) that no opinion is expressed upon it in that case.

It is provided by statute (Rev. Stat. ch. 147, § 14) that "no person shall acquire any right or privilege of way, air, or light, or any other easement, from, in, upon, or over, any land of another by the adverse use or enjoyment thereof, unless such use shall have been continued, uninterrupted, for twenty years." The succeeding sections prescribe the mode of preventing the acquisition of such rights. These enactments were obviously not designed to create or give such rights, or to determine when or upon what terms, they had already been acquired. These matters were left to be decided by the law as it previously existed. The object was to prevent their future acquisition except upon certain prescribed conditions. It does not even appear to have been intended to declare that they would, in future, be acquired by virtue of the statute merely, but rather to prevent their acquisition without conformity to its provisions, leaving the decision to the previously existing law, whether any would be acquired. But whatever may be its true construction, it can have no influence upon the plaintiff's rights in this case.

The second question is, whether, upon the facts proved, a grant or other contract securing to the plaintiffs an unobstructed flow of light and air, can be presumed. According to the English doctrine, such a presumption can arise only where the right claimed has been so exercised for twenty years against the owner of adjoining land, that he might, during all that time, have interfered so as to obstruct the light and air. The rule is more rigidly stated in *Daniel* v. *North*, (11 East, 372.) Lord Ellenborough says, in that case: "The foundation of presuming a grant against any party is, that the exercise of the adverse right on which such presumption is founded was

against the party capable of making the grant." Le Blanc, J., in the same case, says: "It is true that presumptions are sometimes made against the owners of land during the possession and by the acquiescence of their tenants as in the instances alluded to of rights of way and common, but that happens, because the tenant suffers an immediate and palpable injury to his own possession, and, therefore, is presumed to be on the alert to guard the rights of his landlord, as well as his own, and to make common cause with him; but the same cannot be said of lights put out by the neighbors of the tenant, in which he may probably take no concern, as he may have no immediate interest at stake." This case decides that the landlord was not precluded where lights had been put out and enjoyed for twenty years, while the premises were in the occupation of his tenant, there being no evidence of the landlord's knowledge of the fact. And how could proof of his knowledge have made any difference? He could then do nothing to prevent it, but by making some erection upon his own land, and he could not lawfully enter upon it and do that while it was held under a lease by his tenant. In *Barker* v. *Richardson*, (4 B. & A. 579,) it was decided that no such presumption could arise while the premises were occupied by a rector as tenant for life, because he was incapable of making such a grant. In *Sargent* v. *Ballard*, *ut sup.* the doctrine stated by Bracton is recognized, that "it must be with the knowledge and permission of the owner, and not merely of the tenants."

The premises overlooked from the plaintiff's windows were occupied by him about eight of the twenty years during which the presumption must have arisen. During these eight years, both estates were in the possession of the plaintiff, and during that time there could have been nothing like an adverse enjoyment of the flow of light and air. The landlord could not enter upon the land, while leased to the tenant, to make any erection to obstruct light and air, and thus prevent an adverse enjoyment. If the English doctrine were admitted here, no presumption could arise to sustain the plaintiff's action.

Plaintiff nonsuit.

Smith *v.* Keene.

Points of practice as to filing bills of particulars, taking exceptions to defect in judgment, &c.

Opinion by Shepley, J. The question in this case was on the validity of a levy on real estate under an attachment made in 1837. The original action, which was the foundation of the proceedings, was commenced on a general count for money had and received. No bill of particulars was filed, but judgment was entered up on certain promissory notes. It was objected that an attachment made on such a writ was invalid — but held good, as the attachment was made prior to the statute of 1838, which requires a specification of the claims to be embraced in the writ. Several other points were taken, such as that the judgment in the original suit exceeded the *ad damnum* in the writ; and that nothing was due to the original plaintiff, &c.; but the court held that the judgment was good until reversed by writ of error, and that evidence could not be offered at this stage of proceedings to show a want of consideration for the judgment, nor could advantage be taken of these positions by a stranger to the original proceedings, unless on proof of fraud.

Howard and *Shepley*, for plaintiff.
Wells and *Sweat*, for defendant.

Inhabitants of Windham *v.* Hanaford et al., County Commissioners.

Powers of county commissioners.

By Tenny, J. The county commissioners have jurisdiction where the petition prays for a road lying wholly within the limits of a town, nor need the location of a road be particularly described. It is sufficient that there be such a description as to give all persons interested sufficient notice of the situation and course of the road prayed for.

Leighton *v.* Reed et al.

Definition of a final judgment.

In this case the plaintiff claimed title to a parcel of land set off to the defendants on execution, and which had been attached on their writ. The validity of the levy was contested. The defendants recovered judgment in June, 1845, and took out execution thereon, but at the following October term, on motion of *their* attorney, that judgment was annulled, the execution ordered to be returned, and the action restored to the docket. At March term, 1846, judgment was rendered in the action thus restored, upon which execution was issued and levied on the demanded premises, April 17, 1846. On the 9th of April, 1846, the plaintiff attached the same premises. The statute provides that no real estate shall be holden by virtue of an attachment longer than thirty days, next after the day on which *final judgment* was rendered in the suit.

Fox, for plaintiff.
Harris, for defendant.

The court, (Wells, J., delivered their opinion,) decided that the judgment rendered at the June term, 1845, for the tenants was, in contemplation of law, the final judgment, and the execution not being levied within thirty days from that time, the land was discharged from the original attachment. He compared it with cases of review and error, in which, by the express provision of the statute (Rev. St. ch. 114, § 94,) "the final judgment shall be construed to be that which is rendered on a review or a writ of error."

Judgment for demandant.

Clapp *v.* Salter.

Circumstances under which a nuisance may be abated.

Trespass for cutting off four feet and nine inches of the gutter of the plaintiff's part of a house owned in severalty with the defendant. It was proved that the part of the gutter cut

off was so rotten that the water came through, and did not pass off into the conductor, to the injury of the defendant's property. It was also proved that the defendant was authorized to place new gutters around the whole house, if necessary. The action was commenced on the day after the defective piece was cut off.

Goodenow, for plaintiff.
Adams, for defendant.

The court (SHEPLEY, J., delivered their opinion,) decided that if, by the defect in the gutter, the water came through and injured the defendant, it was a nuisance, which the defendant might abate, and, as he was authorized to put up new gutters, it did not appear but that he would have repaired the part removed, if time had been allowed him.

SUMNER ET AL. *v.* STONE AND TRUSTEE.

Time within which a motion may be made to dismiss a writ for alteration after service. Evidence is inadmissible to prove a *general* custom.

THE first question was on a *motion* made before issue joined, to quash the writ for an alteration after service. The motion was not made until late in the term, and after a general appearance and an offer to be defaulted for a small part of the claim. The defect or alteration alleged was, the addition of a trustee form to a common writ of attachment, after an attachment of real estate and before service on the defendant. No evidence was offered of any alteration except the allegations in the defendant's affidavit. The judge at the trial refused to sustain the motion on general principles, and because no alteration was apparent on the process. The defendant then moved that the action be postponed to enable him to produce and file a copy of the writ served on him in New Hampshire, which the judge declined, and ordered the case to trial. To these rulings defendant excepted. The action was on an account for goods sold and delivered: and defendant contended that he was entitled to a credit of six months, which had not elapsed when the action was commenced, and offered testimony to show that he

had purchased goods at other places in Boston, about the same time on six months, and that it was the custom for Boston merchants to give a credit of six months to country traders, which testimony was rejected. There was no direct proof of the terms on which the sale was made, but from the whole testimony in the case, the defendant insisted that the judge ought to instruct the jury that they should infer that a credit of six months was intended and given. The judge refused to give such instructions on these several points.

Willis and *Fessenden*, for plaintiff.
Barnes and *McCobb*, for defendant.

The court (by TENNY, J.) sustained the previous rulings, (1.) in regard to the alteration, that it was not available on motion under the circumstances of the case; and that it was discretionary with the judge at trial to postpone or not. And (2.) that proof of a general custom cannot be admitted to sustain a claim for credit, — that the custom is vague and indefinite, and to entitle to credit a particular agreement must be shown. The judge was also sustained in his refusal to instruct the jury that from circumstances exhibited they were bound to infer a credit.

Judgment on the verdict.

United States District Court, Massachusetts, May, 1848.

LENOX ET AL. *v.* WINISIMMET COMPANY.

It is an act of culpable negligence in a ferry-boat to run on a dark night through a crowded harbor, and rely solely upon a wooden frame compass, which would not traverse so easily as a lighter one which was on board at the time.

The general rule of the maritime law is that a vessel at anchor in a thoroughfare is bound to exhibit a light in a dark night.

Where two vessels are guilty of negligence, the aggregate damage and costs must be equally divided.

SPRAGUE, J. The schooner Tiberius, while lying at anchor between East Boston and the navy-yard at Charlestown, was, at about 10 o'clock P. M., on the 8th of September last, run into by the steamer Winisimmet, plying as a ferry-boat between Chelsea and Boston.

The first question is, what was the position of the Tiberius? Upon this point there is a distressing and irreconcilable conflict of evidence, and the best conclusion at which I can arrive is, that she lay somewhere from three hundred to five hundred feet from the edge of the channel at East Boston, and from five hundred and fifty to seven hundred and fifty feet from a straight line drawn from the ferry-ways in Chelsea to the ferry-ways in Boston. The Tiberius came to anchor at that place between 7 and 8 o'clock, A. M. on the 8th, and lay there during the day, in full view of the steamer. To repel the inference of negligence from the Winisimmet being so far from her usual track, it was proved by the respondents that the night was extremely dark, from clouds and fog, so that the boat, for the greater part of the distance, could be steered only by the compass; that there was very little wind, not exceeding a three-knot breeze—the water smooth—so that the compass would not traverse quickly, and the boat might vary her course from one to two points before the compass would indicate a change in direction; and also, that the varying currents setting up the harbor and into Charles and Mystic rivers increased the difficulty. The steamer had two compasses, a brass and a wooden one. At the time of the collision she was passing from Chelsea to Boston, and was steered solely by the brass compass, and it is proved by the testimony of Captain Reed, who commanded her at the time, that this did not traverse so well as the wooden one.

Considering the darkness of the night, the difficulties of navigation, and that there were vessels lying at anchor on both sides of the usual track of the steamer and those off the navy-yard so near as to compel her to deviate from a straight course, I think she must be holden to the utmost care and vigilance, and that the omission to make use of the lighter compass, which was best adapted to the occasion, and which would have been the quickest to exhibit a deviation from the proper direction and most likely to indicate her true course, must be imputed to her as culpable negligence.

The next question is whether the Tiberius was also in fault. Between 7 and 8 o'clock the officers and crew all turned in for the night, leaving no light. The general rule of the maritime law is, that a vessel lying at anchor in a channel which is a thoroughfare, which other vessels have frequent occasions to

pass, is bound to exhibit a light when the night is dark. *The Scioto*, (1 Law Rep. new series, p. 16.)

By the evidence in this case it appears that there is no uniform custom in Boston harbor as to keeping a light. The larger vessels and those engaged in the foreign trade generally do so, but the eastern coasters, the class to which the Tiberius belonged, generally do not. Mariners have given different opinions on the stand as to the prudence or imprudence of a vessel lying without a light in the position of the Tiberius. Most of the ship-masters and all three of the pilots who have been introduced, have strongly expressed the opinion that it was imprudent for a vessel to lie in that place without a light, and considering that the Tiberius lay in the channel at a place where, or at least very near which, vessels have frequent occasion to pass, and that she had seen the steamer plying as a ferry boat during the whole day, and ought to have known that her usual time of running extended beyond the time of collision, and considering also the extreme darkness of the evening, I think it was not justifiable in the officers and crew of the Tiberius to go to rest for the night, exhibiting no light and leaving no person on deck.

Both vessels, therefore, were guilty of negligence, and the rule in the admiralty in such cases is, that the aggregate damage to both shall be divided equally between them, as was decided by this court in the case of *The Rival*, (9 Law Reporter, p. 28.) As to the costs, each party will be decreed to pay one half.

Court of Common Pleas of Massachusetts, Suffolk, January Term, 1848.

ELISHA H. HALL *v.* CITY OF BOSTON.

Course to be adopted when the *ad damnum* in the writ is less than the verdict.

THIS was an action on the case to recover damages for an injury alleged to have been received in consequence of a defect in one of the streets of the city of Boston. The counsel for the plaintiff, in opening the case to the jury, stated, that by the Revised Statutes of Massachusetts the plaintiff was entitled to recover actual damages, if the defect had existed twenty-four hours, and these were to be doubled in case the defendants had

actual notice of the defect; and he intimated that the *ad damnum* in the writ was less than the party expected to recover if the double damages were awarded, suggesting that the jury would find the single damages, and the court would double them as a penalty on the defendants. But the court, (MELLEN, J.) stated that the jury were to find both points and return a verdict accordingly. Formerly, the practice was as stated by the counsel, but not so under the Revised Statutes. The plaintiff then went to trial. The jury returned a verdict, finding the single damages less than the *ad damnum* in the writ, and then doubled the damages on the ground that the defendants had due notice of the defect, making the verdict more than the *ad damnum* in the writ, and the verdict was recorded. The plaintiff subsequently (after verdict) moved to amend by increasing the *ad damnum*, but the motion was refused.

P. W. Chandler, for the defendants, (having taken a bill of exceptions to the rulings of the judge at the trial in order to carry the case up) now moved an arrest of judgment because the verdict exceeded the *ad damnum* in the writ.

MELLEN, J. If the plaintiffs take judgment it will be clearly error, but is this the proper manner to move in the matter? The verdict being more than the *ad damnum* is not a ground for a new trial on motion of the defendants.

Chandler. The motion is not for a new trial, but simply in arrest of judgment. *Some* judgment must be rendered in this court before the case can go up. What shall the judgment be? Not *on* the verdict, because the verdict exceeds the claim. Not less than the verdict, unless the party consent. The plaintiff must remit the excess, or judgment must be arrested.

Richardson and *Hinds*, (with whom was *J. C. Park*,) for the plaintiff. Judgment may be rendered for the whole amount of the verdict. The case may be distinguished from those in the books where the verdict exceeded the *ad damnum*. The double damages are in the nature of a penalty on the defendants. A party is entitled to recover in the first place actual damages; then, if it appear that the city or town had notice of the defect, the damages are to be doubled. If the single damages are

less than the *ad damnum*, it is of no consequence that these damages when doubled are larger than the *ad damnum*. Judgment may be rendered for the whole amount.

MELLEN, J. I have no doubt on this point. The jury are to find single damages, and if they are satisfied that the defendants had notice, then they are to double the damages. The whole matter is for them. The verdict is entire, although the jury were ordered, and, in fact, did find the two points separately. Judgment cannot be rendered for more than is claimed. The motion in arrest will be allowed unless the plaintiff remits the excess of the verdict above the *ad damnum* in the writ.[1]

United States Circuit Court, at Boston, October Term, 1847.

WEBB ET AL. *v.* BOWERS ET AL.

Rule in relation to costs.

The complainants had brought a bill in equity against the respondents for an alleged infringement of copyright. The case having been referred to the master, at a former term, was argued on his report, and the court refused to grant an injunction, but ordered the case to be continued to enable the complainants to bring a suit at law if they saw fit. The respondents moved that the bills be dismissed with costs, but Woodbury, J. *held*, that the case seemed to come within one of the exceptions to the general rule, that costs must go with the prevailing party. The exception was that where the remedy in equity was refused, and yet the party plaintiff might proceed at law, costs would not be allowed. But the complainants must stipulate that they will not proceed at law or costs will be allowed. It was ordered that costs should be refused to both parties, if the complainants should, within ten days, enter a stipulation not to proceed at law.

Supreme Court of New York — In Equity — Before Judge Edmonds.

PHILLIPS *v.* BURGHER.

A specific performance of a personal contract will be enforced in equity where the party wants the thing in specie and cannot otherwise be compensated, where an award of damages would not put him in a situation as beneficial as if the agreement was specifically performed; or where compensation in damages would fall short of the redress to which he is entitled.

The rule being mutual if the party agreeing to sell an article would be bound to perform specifically, he can compel the other party to pay, notwithstanding that a decree would be nothing more than a verdict and judgment at law.

An agreement of a creditor to take less than the face of his demand, upon receiving security for the amount to be paid, is a valid agreement by reason of the additional benefit arising out of the security stipulated for.

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[1] The plaintiff subsequently entered a *remittitur* on the record, and judgment was rendered for the rest, and the case went up on the exceptions.

Notices of New Books.

A Treatise on the Law of Evidence in the Courts of Equity. By the late Richard Newcombe Gresley, Esq., M. A., Barrister at Law. Second edition, with such alterations as to render it conformable to the statutes, decisions and general orders, regulating the law and practice, as to Evidence, in the High Court of Chancery, together with divers further illustrations, by reference to the law and practice, as to Evidence in the Courts of Common Law and Civil Law, by Christopher Alderson Calvert, Esq., M. A., Barrister at Law. Second American edition, with Notes and References to American Decisions. Philadelphia: T. & J. W. Johnson, Law Booksellers, Publishers and Importers, 197, Chestnut street. 1848.

The rules of evidence are, in general, the same in equity as in law, and questions of the competency or incompetency of witnesses, are decided upon the same principles in courts of each jurisdiction. There are, however, two important distinctions, the first of which consists of the almost universal preference given by courts of equity to written rather than to oral evidence, and the second in the power of examining the parties which exists in courts of equity. It is to explain the details of these peculiarities that a distinct treatise upon equity evidence is required.

The second English edition of Mr. Gresley's work, appeared last year. It was enriched by the very valuable additions of Mr. Calvert, who knowing, (to use his own words) "from experience, as well as an apprehension of the nature of the subject, how defective, after all, a work of this kind would be, which should comprise the decisions of the courts of equity only, upon matters wherein such courts desire to know and follow the practice of law," took pains to add to the authorities collected by Mr. Gresley, a great many more from the Common Law Reports, and also a few of the *dicta* of the (so called) civil courts.

This improved edition is now offered to the American public, with additional notes and references by a member of the Philadelphia bar, who has fulfilled a promise "rather to indicate the sources of authority than to increase the bulk and expense of the volume by reprinting matter which was already in the possession of the profession." There is hardly time, in this number, to refer very particularly to the American part of the work; but we would call attention to several of the notes to show how faithfully the work has been performed, and that the aim of the American editor has really been to make it practically useful. Thus see note A, (p. 120,) in regard to the taking of depositions, &c.; note B (p. 247) in regard to

secondary evidence; note A (p. 530) in regard to issues of law; and note A (p. 538) upon the subject of affidavits.

A Treatise on the Law of Legacies, by the late R. S. Donnison Roper, Esq., Barrister at Law, of Gray's Inn, and by Henry Hopley White, Esq., Barrister at Law, of the Middle Temple. With references to American Cases. Second American, from the fourth London edition. In two volumes. Philadelphia: Robert H. Small, 25, Minor street. 1848.

We noticed the latest London edition of this work in 10 Law Reporter, 377, and stated, at the time, that an American edition of the same work would soon be forthcoming. That edition has now made its appearance. It would be useless to repeat what has been already said in favor of the English work. The American edition contains a goodly number of references to American decisions, which, however, do not materially increase the size of the volumes. The wants of the profession are already well supplied by the excellent work of Mr. Jarman, which has been so well Americanized by Mr. Perkins. Still, we have no doubt that this work will prove serviceable, and that the Philadelphia edition, containing as it does all the improvements of the latest London one, will supply any deficiency which can possibly be felt.

In the short time which has been allowed us, we have been unable to do justice to the labors of the American annotator. But after a cursory examination, our attention has been directed to several notes, which have certainly been most thoroughly and accurately prepared. Among these may be included the notes in the first volume, pages 2, 4, and 16, upon the subject of mortuary donations. Again, on page 80 of the same volume, there is a very complete note, (10) in which all the decisions and legislative provisions of the several states upon the subject of illegitimacy have been carefully collected. On page 478, of the same volume, there is a very elaborate note upon the "effect of the death of legatees before the testator upon the interests of persons in remainder, where the legacies are limited over upon the happening of particular events." This subject is at best an obscure one, nor does it appear to have been entirely made plain by the statutory provisions of our own and other states. Another note, very carefully prepared, appears on page 797, (vol. 1,) upon the subject of conditions in restraint of marriage, which is well known to be a point of law admitting of most subtle distinctions. There is a valuable note in the second volume (p. 1518) in which the editor has collected the various particular words and phrases which have been judicially passed upon in this country. This note contains nearly eighty decisions. On page 1616, there is another very faithfully prepared note, upon "the application of the doctrine of election to the widow entitled to dower." And on page 1669, there is a note exhibiting evident signs of labor, embodying a great many leading decisions illustrative of the statutes of distribution in the several states of this country.

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Miscellaneous Intelligence.

Deeds made by Married Women. — Mr. Editor: It seems to me that the point of law put in issue between the Chief Judge of Ohio and me, by himself, in his January letter, is of general interest to the legal profession of the country. At all events it is important to the bar of that state; and besides it has only been partially discussed by my opponent in your journal. I am therefore entitled on other than grounds purely personal, to reply as fully as the subject and occasion admit.

It will be seen by the letter referred to, that the chief judge abandons his dissenting opinion in *Good* v. *Zercher* to its fate, and confines his defence against my strictures to the later case of *Barton* v. *Morris*, where he pronounced the decision of the court. This I cannot allow; but it will abbreviate what I have to say on the case abandoned. According to Chief Judge Birchard's dissenting opinion, therein delivered, the legislature may declare that any deed, signed, sealed and acknowledged before witnesses by a married woman shall have been sufficient to divest her title without the acknowledgment before a justice of the peace, which was also required by the act of 1820, then in force. He quotes that law as follows:

"That when a husband and wife, &c. shall execute a deed, &c. it shall be signed and sealed by the husband [and wife] and the signing and sealing thereof shall be acknowledged by them in the presence of two subscribing witnesses, who shall attest the acknowledgment of such signing and sealing; and also be acknowledged before a judge, or justice of the peace, who shall examine the wife separate and apart from her said husband, and shall read, or otherwise make known to her, the contents of such deed, &c.; and if, upon such examination, she shall declare that she voluntarily and of her own free will and accord, without fear or coercion of her husband, *did and now doth* acknowledge the signing and sealing thereof, the said judge or justice shall certify the same," &c. &c.

When the Chief Judge comes to reason on the effect of the deed before him, he falls into the unaccountable error of forgetting entirely the second of the above statutory requisitions, viz. THE ACKNOWLEDGMENT before the judge or justice. He says, (12 Ohio Rep. 374) "the husband and wife shall execute the deed by signing and sealing it, in the presence of two subscribing witnesses, and by acknowledging it in *the presence of the witnesses*. The statute provides what this execution and acknowledgment shall be. Suppose all this done, and the deed delivered. It *constitutes everything* that the law requires the parties to do to pass the title to the grantee." This is emphatically and obviously erroneous. A second acknowledgment before a judge, or justice is necessary also; and *there is no power to convey without it*. Such an acknowledgment is at least as neces-

sary as the signature or seal to the deed, or the first acknowledgment before the attesting witnesses; or even as the fine at common law. Of two essentials also, the Chief Judge, with a curious infirmity, chooses the least. The acknowledgment before witnesses is treated as indispensable; the infinitely higher acknowledgment before a judicial officer on private examination is not even adverted to; is passed over in silence; probably forgotten. I regret that I have not space for the whole of the masterly judgment of the court in this case delivered by Judge Read, which has so exalted his reputation. The main question was one of law; and turned on the validity of the so called curative act of 1835, by which our legislature attempted to set up such prior defective deeds as Mrs. Zercher's by retrospection. She had executed the deed, but the magistrate had not made known the contents of it to her on private examination, as the jealousy of our law over the deeds of married women required. The law of 1835 declared such a deed to be valid, notwithstanding. The court held that during coverture a woman could only be divested of her real estate according to the existing statute, strictly pursued in all its requisitions. That the act of 1835 was unconstitutional because it attempted to transfer the land of a *feme covert* by acting on her defective deed, not binding when executed.

I shall dismiss this opinion by abstracting a very late case from the Kentucky Reports on the same subject, which is pertinent to the discussion, and within the scope of a journal disseminating the latest legal intelligence. *Pearce's heirs* v. *Patten et al.*, (7 Ben. Hardin, 152.) "The 11th section of the statute of 1831, (St. Law 450) so far as it authorizes a court of chancery to confirm title in a vendee of a *feme covert*, who has conveyed by deed which was ineffectual when made, impairs the obligations of contracts, and is in violation of the constitution of the United States, (1 sec. art. 10) . . which applies to executed as well as executory contracts. A statute which gives force and validity to a void contract, though it does not impair the obligation of that contract, yet by giving force and validity to a void contract, or that which was no contract before, but a mere attempt to make a contract, by which the fee is taken from one and given to another, effectually destroys, nay, uproots and destroys the contract by which the property was held, and is therefore unconstitutional." This goes a hair's length beyond the Ohio decisions. It holds that not even a court of chancery can set up a void deed, as a contract under any circumstances. The court say they disapprove the decisions of Pennsylvania, and approve those of Ohio, on the same proposition of constitutional law. But, alas! for the mutability of that most mutable of human affairs, the judicial tribunals of the states of the Union. Each of the states above-mentioned has not only changed ground, but has changed front on the fundamental question, whether the legislature (an assembly of men) can legally confiscate the property of married women at their sovereign will and pleasure. The supreme court of Ohio, by Chief Justice Birchard, last winter, in the desolating case of *Shane's Lessee* v. *Chesnut*, by turning a complete somerset, has overthrown the well considered and logical opinion in the negative, in *Good* v. *Zercher;* and substituted a vile imagination in its place. The supreme court of Pennsylvania, by its great

Chief Justice (Gibson,) in *Menges* v. *Wartman*, (1 Barr, 18,) as late as 1845 repudiated the old errors on the subject, which have disfigured their reports. But neither of these judicial evolutions were known or anticipated at the fall term of 1846 to the Kentucky Court of Appeals. Chief Justice Ewing says, therefore, "we are aware that the courts of Pennsylvania have established a different doctrine in relation to the subject before us, from the doctrine here avowed, and have even gone much further than we are required to go in sustaining legislative enactments, in giving validity to void and invalid contracts. But we never can bring ourselves to sanction the doctrine there established. The supreme court of Ohio, in the case of the *Lessee of Christian Good* v. *Elizabeth Zercher*, (12 Ohio R. 364,) had the subject under consideration in a case very analogous to the one before us, and have established a different doctrine from that sustained in Pennsylvania, and one calculated to preserve and sustain the inviolability of private rights against legislative interference."

The chancellor of the Louisville chancery court had dismissed the bill to set up the attempted deed of the married woman, and his decree was unanimously affirmed by the Court of Appeals. By the last Ohio decision, in *Shane* v. *Chesnut*, from the author of the bungling dissent in *Good* v. *Zercher*, our state has completely fallen out of line, and nothing but confusion and alarm can prevail till the true doctrine of the court in the latter case becomes the law again, and under it order and justice shall be restored. No conceivable amount of pressure from without, nor extent of infirmity within our supreme court, can long displace the eternal foundations of individual right, nor break the force of those first principles which are of universal obligation.

With regard to Chief Justice Birchard's defence of *Barton* v. *Morris*, nothing can be more vulnerable unless it be the opinion thus effectually exposed. His letter states that "the point decided was, that the certificate showed a substantial compliance with the statute. There never was a decision in Ohio, that would make this acknowledgment defective. Such deeds since 1795 have uniformly been held well executed to pass the estate of the *feme covert*." The writer also furnishes the extract from his opinion, relating to the point attacked, by which he is remedilessly stultified. Mrs. Canby, the wife, on separate examination, "declared that she *signed* the same, without fear or coercion of her said husband, and of her own free will and accord. The statute (already quoted) required that on separate examination, the wife should acknowledge the signing, *and sealing* of the deed, and that this (the acknowledgment) should be certified by the magistrate, (2 Chase, 1139); *Brown* v. *Farren*, (3 Ohio R. 140,) is an authority recognized in *Connell* v. *Connell*, (6 Ohio R. 253,) and is at this time the law of this state. The doctrine established there is, that words used in the certificate of acknowledgment, which are equivalent to the words of the statute, are sufficient. Let us consider then, whether this deed and the certificate do not show that every requisite of the statute has been complied with in substance and in fact.

"The signing and sealing and delivery were all done at the same time.

This appears from the *testatum* clause of the deed, and from the attestations of the subscribing witnesses. The signing and sealing are one act, done at the same time. The signature adopted the seal already prefixed, and made the same the seal of the grantor, so that in point of fact, there could be no separation. If the signing were done voluntarily, it is impossible the sealing was not equally so. What does the certificate show? That Mrs. Canby united with her husband, and acknowledged both the signing and the sealing. When separately examined, she said the act thus done, was her voluntary act and deed." This is the whole of the Chief Judge's reasoning. And as Mr. Webster says, "who does not see without the aid of exposition or detection, the utter confusion of ideas involved in this elaborate and systematic argument?"

I have already in the review for the Western Law Journal, held up this *morceau* of adjudication, heartily to ridicule, and shall now be content with its own refutation. But I have something to say of the assertion of the letter, that the certificate of acknowledgment in question, is good by all the decisions of this state; and that since 1795 such deeds have been uniformly held well executed. The assertion is not only wholly destitute of foundation, but I affirm the converse of it, that this certificate is bad under all the Ohio cases; and never, since 1795, was such a deed held to have been well executed in a single recorded case. Let us investigate this positive contradiction. The objection to the certificate is, that it does not show, that Mrs. Canby, on private examination, acknowledged the sealing of the deed; she acknowledged the signing only, without any words being used equivalent to, or even referring to any other acknowledgment upon private examination. This was always necessary. "The certificate of the acknowledgment must show either in express terms, or by implication, a compliance with every substantial requisition of the statute. This act requires, before the right of a wife to lands can be affected under it, first, a separate examination of the wife; second, that the wife should be made acquainted with the full contents of the deed; third, an acknowledgment that she voluntarily *sealed* and delivered it." Per Read J., *Meddock* v. *Williams*, (12 Ohio R. 118.) "It is the settled law in Ohio, that the interest of a married woman in real estate, can only be transferred in the mode, and by full compliance with the statutory requisitions prescribed to be pursued, and to be performed to authorize her to convey." Read J., *Silliman* v. *Cummins*, (13 Ohio R. 118,) citing all the earlier cases. Ch. J. Birchard relies on two cases from the reports as authorities for his ruling in *Barton* v. *Morris*, both of which are against his proposition. *Brown* v. *Farren* shows, that the wife, on separate examination, "acknowledged *the above indenture* to be *their* act and *deed*." It was *held* (3 Ohio R. 153,) that this was an acknowledgment of the signing and sealing. *Per Cur.* "*The instrument* was acknowledged by both husband and wife, to be their voluntary act and deed before the magistrate, which could not be the fact unless they had signed and sealed it, for signing and sealing are indispensably necessary *to create a deed*." In *Connell* v. *Connell*, the certificate was that the husband and wife jointly acknowledged the indenture to be their act and deed. Afterwards, "the

said Eleanor, when being privately examined, separate and apart from her husband, acknowledged that she signed the same of her own free will, without any compulsion from her husband, and so freely relinquished her right to dower." It was objected, that the certificate "does not prove that on her separate examination, she declared or acknowledged that she *sealed*, or that she delivered the deed. It is said that the wife acknowledged the deed to be her indenture — that this proves the acknowledgment of the sealing. But this declaration was not when she was separate from, but present and jointly acting with her husband." The reply was, that the certificate showed a declaration by the wife, that she relinquished her right of dower, and as that could only be done by deed, the certificate showed a substantial compliance with the law, and raised an irresistible inference that the wife had acknowledged the sealing. The Court set aside the deed on another point; but although it was unnecessary to decide it, they seem to have been in favor of the objection that the acknowledgment of the sealing was not sufficient. Ch. J. Birchard speaks at random when he declares, that he is borne out in his decision by all the cases; and will no doubt be as much surprised as anybody else to find that he has wholly misconceived the very cases upon which he most confidently relies.

Still more obvious, however, than in any of the previous authorities, was the line of decision in *Barton* v. *Morris*. It is the plainest of all plain cases, and probably for that very reason, the chief judge went aside to volunteer an erroneous opinion from sheer love of adventure. The case is perfectly free from all question as to equivalent words, which presented the difficulties in the other two cases. Here, the wife on the separate examination, merely acknowledged to the justice that she had signed the deed; not that *the instrument* so signed was *her* deed; nor are there any expressions to that effect. The imperative words of the act are, "did and now doth acknowledge the signing and *sealing* thereof;" and so both the seal and the acknowledgment of the sealing were indispensable to divest her estate.

It is by such lawgivers as the legislature of 1835, and by such law expounders as our supreme judges, that for the present it is established as the Ohio doctrine, that the weaker sex have no rights of property which cannot be despoiled by speculators, and confiscated by the courts. Barbarism cannot go further backward; nor any civilized age furnish rivals to the prosperous agents of this profitable iniquity. W. M. C.

Doctrine of Amendments. Amendments may be ordered by the court, either by the authority of the common law, or by that of statutes.

For amendments in matters of *form*, the authority of the common law is amply sufficient for every purpose before judgment. "Proceedings are considered as *in fieri* till judgment," and "therefore till then courts have power to permit amendments at common law."[1] (3 Bla. Com. 407.)

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[1] "Whilst the proceedings are *in paper*, the amendment is at common law, and not within any of the statutes of amendments, which relate only to proceedings of *record*.

In matters of *substance* also, or whatever is *essential to the merits of the action or defence*, the common law gives the court a broad and liberal power, which they are bound to exercise with a sound legal discretion, for the furtherance of justice. The power is granted only for the purposes of justice, and is limited by them. Lord Kenyon says, "the best principle seems to be that, on which Lord Hardwick relied, that an amendment shall or shall not be made as will best tend to the furtherance of justice." "Amendments of this kind are not made under the statutes of *jeofails*, but under the general authority of the court." *Rex* v. *Mayor, &c. of Grampond*, (7 T. R. 699.) This was a case of amendment in *substance*, and refused on the ground that it would not be for the furtherance of justice. Whenever amendments of this kind have been allowed or refused, it has obviously been done with a view to this principle. Amendments have therefore been refused, which changed the ground of the action — which introduced a new substantive cause of action — which altered the kind of action, and of course the plea and defence. Under some circumstances also, amendments have been allowed, though resisted as liable to some or all of these objections. Amendments reaching the *substantial matters* in controversy, as they are allowed at law to promote justice, must be allowed as to *time*, and *terms* or *conditions*, so as not to operate with any injustice to the adverse party. Hence all the regulations as to continuances, repleading, paying costs, &c. &c.

It is no objection to an amendment that the action is *penal*,[2] for they are civil actions, and amendments within or without the statutes are allowed in such cases as well as others. All amendments in penal actions are at common law in England, as their statutes of amendments and *jeofails* do not extend to them. Amendments are so exclusively in the

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And there is no difference as to the doctrine of amending, at common law, between *civil* and *criminal* cases, nor between penal and other actions." (Tidd's Prac. 659.) "When the proceedings are entered on *record*, the court will amend no further than is allowable by the statutes of amendments." (Ibid. 660.) "After error brought in K. B. on a judgment of C. B., the amendment may be made in K. B. or in the court below." (Ibid. 6623.) "At common law, indeed, the judges might amend as well their judgment as any other part of the *record*, in the same term, in which it was pronounced; for during that term, the whole contents of the *record* were holden to be in the breasts of the judges, and not in the roll." (Lawes's Pleading, 16, 17. See also Ibid. 28, and Co. Litt. 260.) "Held (3 Salk. 31,) that while the declaration is *in paper*, the court may give leave to amend anything in it at pleasure; because, in such case, it is not within the statutes of amendments; but when once it comes *in parchment*, the court can allow amendments no farther than the statutes allow them, for it is then *a record*." (5 Dane, 437.)

[2] *Maddock, qui tam.* v. *Hammett*, (7 T. R. 55); *Mace, qui tam.* v. *Lovitt*, (5 Burr. Rep. 2833); *Bonfield, qui tam.* v. *Miller*, (2 Burr. Rep. 1098.) This amendment was in the date of the note, on which *usury* was taken; and declared to be allowed at common law, by Lord Mansfield. *Goff, qui tam.* v. *Popplefield*, (2 T. R. 707.) Motion to amend the *dates* and *sums* in a declaration for usury. It was admitted that the court had the power at common law. But the amendment was refused, because the action had been pending four years, and the statute of limitations had run against a new suit for the same offence. *Hamilton, qui tam.* v. *Boiden*, (1 Mass. Rep. 50.) Motion to amend the *date* of a note, on which usury was taken — refused. Dana, C. J., said it was at common law, and in their discretion.

discretion of the court, that no writ of error will lie to reverse any decision allowing or disallowing them. *Liter* v. *Greene*, (2 Wheat. R. 306.)

The statute authority to permit amendments uses the expressions "*circumstantial errors or mistakes*" — "*where the person or case may be rightly understood by the court*" — "*through defect or want of form only*," and is nearly the same in the different statutes of this commonwealth, and of the other states, and in the United States statute of Sept. 29, 1798. Speaking of these acts, it is well observed by Mr. Dane (Abridg. 6, p. 271,) "it is clear that our American statutes of amendments and *jeofails* have been formed and worded in substance from the English acts." The material question is, to what kind of defects they extend? It has been already observed, that ample provision exists at common law for the amendment of all *substantial* defects. This is because all such amendments must, of course, be made before the trial and judgment. "For it is a general and essential rule of law, that all substantial facts be stated in proper time and place, so that the other party may seasonably know what *in substance* he has to answer to, and prepare accordingly." (6 Dane's Abr. 267.) *Formal* defects may, of course, be amended at common law in the same manner.

But the difficulty was, that at common law, when the case had passed into judgment, the term ended, and the record made up, both *substantial* and *formal* errors were alike irremediable. Neither the parties nor the case were before the court, and they had no authority to interfere with their rights. It was then emphatically true, that what was written was written, and became in the precise shape, in which the court left it, as much a rule of right to the parties as the most solemn instrument they could execute. If it was deficient in any of the requisites of law, however *formal*, it was as completely vicious as a deed without a seal, and liable to be reversed.

It was to prevent such evils, in cases where the *substantial* rights of the parties had been adjudicated, that the English and American[1] statutes were enacted. "The chief intent of all the statutes of jeofails seems plainly to be, that the wrong pleading of any collateral matters, *not essential* to the action, should, after the expense of a trial, and verdict for the party, be aided, but not to extend to matters of *substance*," &c. (1 G. Bac. 160.) The same doctrine is laid down by Dane, in relation to both the English and American statutes. He says: "It may be

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[1] "Our American statutes extend the powers of courts to allow amendments in all cases in *proceedings in course of justice* at all times, with the exception of matters of *substance*, and the exception of criminal cases." (6 Dane's Abr. 291.) In *Marriat* v. *Lister*, (2 Wils. Rep. 147,) the declaration was *indebitatus assumpsit* for money *lent* to a third person at defendant's request. The plaintiff obtained a verdict in C. B., and the judgment was arrested. Plaintiff brought a writ of error in K. B., and moved to amend in C. B. by inserting the word *paid* instead of the word *lent*. *Sed per Cur.* "Such an amendment was never made" — "the amendment now prayed is at the common law" — "no statute goes so far as to empower us to make an amendment which would alter the trial and the issue" — this would "change the record in a most *substantial point*." If this amendment is allowed, the plaintiff would "recover upon an issue that has never been tried."

observed on all these statutes, that they aid only matters of *form* in civil actions, or circumstantial errors or mistakes, and not matters *essential* to he action or defence, or of *substance*, even in civil actions, and they have no relation to suits properly criminal." — 6 Dane's Abr. 274, 267. Mr. Lawes says, "Before these statutes, after verdict and judgment upon the merits, it was often reversed for mere slips," &c., "but by these acts, a pleader is permitted to amend any defect in *form* he may discover in his proceedings." — Lawes Pleadings, 28. The purpose and effect, therefore, of the statutes of amendment in England and this country,[1] was not to augment the power to make amendments in regard to errors in *substance* or *form*, in actions while pending before the court, but only to extend the power to the amendment or cure of *formal* errors or mistakes found in the *record* after it was made up and completed.

It is often a question of some difficulty, whether a particular matter is *substance* or *form* — *circumstantial* or *essential?* In England an *ad damnum* is in some cases *improper*, in others merely *formal* and *nominal*, and in others *essential*. It is *essential* in covenant, case, assumpsit, replevin, trespass and "other actions for the recovery of damages," and must be sufficient "to cover the real demand." "In debt, the object of the action being to recover a sum of money *eo nomine*, the damages are merely *nominal*." In penal actions it is *improper* to conclude *ad damnum*, because, "as the plaintiff's right to the penalty did not accrue till the bringing of the action, he cannot have sustained any *damage* by a previous detention." — 1 Chitty Pl. 398.

But our practice is in some respects different. The statutes of writs generally render this clause a necessary part of every declaration, in actions commenced by attachment or summons; and other statutes render it of essential importance in most personal actions. It gives the defendant information of the extent of the plaintiff's demand. "The plaintiff cannot recover greater damages than he has declared for, and laid in the conclusion of his declaration." — Com. Dig. Pleader, C. 84; 1 Chitty Pl. 398. In many cases it is all the information, which the declaration contains on this subject, of all others the most *substantial* and *essential* — the sum to be recovered. It limits the power of the jury in their verdict, and of the court in their judgment. It often determines the jurisdiction of the court, whether original, final, exclusive, or appellate — and whether the case may be reëxamined on review, appeal, or error. It is also entirely in the election of the plaintiff, from one cent, indefinitely. "If judgment be given for more than the *ad damnum* it is error, and a court of errors

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[1] Chief Justice Parsons, in the case of *Haynes et ux* v. *Morgan*, (3 Mass. R. 308,) says, "that at the common law very few amendments are authorized, and those when there was something in some part of the record by which to amend. The authority of this court to amend is derived from statutes." This remark respecting the common law must have been intended to apply only to cases, where judgment had been rendered and the *record* made up, and not to cases pending before the court.

cannot reduce the sum to the amount stated in the declaration." 1 Chitty Pl. 398, citing *Bonner* v. *Charleton*, 5 East, 142.[1] This is because it is matter of *substance*, therefore not within the statutes, and cannot be altered after judgment. "Therefore, (says Chitty) if the verdict be for more than the damages laid in the declaration, *remittitur* should be entered as to the surplus, before judgment." Obviously, because before that time the court have it in their power to make *substantial* amendments[2] by the common law, but afterwards there is no remedy, because the statutes do not reach the case.

The statutes neither confer nor increase the power of the courts to make *substantial* or *formal* amendments in suits pending. That power was ample without them. Their only object was to amend or cure *formal* or *circumstantial* errors after judgment. T. F.

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[1] In *Parsons* v. *McMasters*, Mass. S. J. C. 1796, (5 Dane Abr. 437,) the *ad damnum* of the writ was less than the verdict and judgment; and several terms after judgment, the court, after error brought, permitted a *remittitur* to be entered. This case is mentioned with approbation by the court, in 10 Mass. R. 252; but they do not appear to have adverted to the question, whether it was matter of *substance* or *form* only, and so whether within the statutes or not. But Chief Justice Dana, who made the decision, relied on the authority of *Pickwood* v *Wright*, (1 H. Bla. R. 643.) In that case the C. B. did the same thing after error brought; but no reasons are given in the report; it is only said, "the court thought it reasonable." It was done without authority from the common law — and if it was *substance* and not *form*, the statutes did not reach it. The position of Chitty, however, (in the text) is supported by numerous cases besides the one he cites. *Wray* v. *Lister*, (2 Str. R. 1110,) where the court say, "it was never thought to be amendable." This was a case where judgment had been rendered on the verdict for more than the *ad damnum* and error brought. See also *Chevely* v. *Morris*, (2 Wm. Bl. R. 1300); *Sandiford* v. *Bean*, (2 G. Bac. 267); *Fury* v. *Stone*, (2 Dall. R. 184); *Burger* v. *Kortright*, (4 John. R. 415.)

[2] If this is done after *verdict*, however, a new trial must be granted, for the reason before given, that the defendant has a right to know, before trial, what, in *substance*, he has to answer to. 1 Tidd Pr. 653; 7 T. R. 132; 2 N. H. R. 322; 1 Caines R. 153; 12 Mass. R. 513; 2 Wils. R. 147.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Master or Judge.
Andrews, William H.	Newburyport,	April 10,	David Roberts.
Bagley, Perkins H.	Boston,	Mar. 14,	William Minot.
Barry, Morrill P.	Boston,	Oct'r. 6,	Willard Phillips.
Bartlett, Jacob C.	Montague,	Mar. 11,	Richard E. Newcomb.
Bolster, Lyman F.	Worcester,	April 22,	Isaac Davis.
Bond, Jeremiah,	Worcester,	" 4,	Isaac Davis.
Bray, Greenleaf,	Boston,	" 11,	Bradford Sumner.
Brown, Justus M.	Lawrence,	" 8,	James H. Duncan.
Calef, Horatio G. K.	Boston,	" 5,	Bradford Sumner.
Carpenter, Comfort,	Douglass,	" 21,	Henry Chapin.
Cook, Amos,	Bridgewater,	Mar. 20,	Welcome Young.
Daggett, William,	Boston,	" 14,	William Minot.
Davis, John,	Boston,	April 29,	Bradford Sumner.
Day, Horace R.	Springfield,	" 18,	E D. Beach.
Dow, Henry B.	Chelsea,	" 4,	Bradford Sumner.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Master or Judge.
Durant, Thomas P. et al.	Boston,	April 19,	Bradford Sumner.
Eames, Charles T.	Milford,	" 25,	Isaac Davis.
Eaton, Ziba,	Spencer,	" 4,	Isaac Davis.
Eaton, William D.	Boston,	" 10,	Bradford Sumner.
Edmands, Charles,	Boston,	" 13,	Bradford Sumner.
Egan, Martin,	Boston,	" 15,	Ellis Gray Loring.
Egan, Martin,	Boston,	" 13,	Bradford Sumner.
Ellenwood, Josiah B.	Boston,	" 8,	Bradford Sumner.
Ellis, Elnathan,	Harwich,	" 12,	Zeno Scudder,
Fogg, David Sylvester,	Dedham,	" 26,	Sherman Leland.
Folsom, Albert A.	Springfield,		N. T. Leonard.
Ford, Thomas,	Boston,	" 18,	Bradford Sumner.
Friend, Samuel,	Lancaster,	" 5,	B. F. Thomas.
Garcelon, Alsom,	Boston,	" 13,	Ellis Gray Loring.
Gerrish, Lewis C.	Chelsea,	" 17,	Bradford Sumner.
Grant, Albert,	Lawrence,	" 8,	James H. Duncan.
Gray, Theodore C.	Templeton,	" 10,	Charles Mason.
Hall, Thomas,	Boston,	" 1,	Bradford Sumner.
Haslam, Thomas,	Taunton,	" 18,	Horatio Pratt.
Hathaway, William F.	Charlestown,	" 1,	George W. Warren.
Hawks, Adan,	S. Reading,	" 3,	George W. Warren.
Hewitt, Eli Jr.	Douglass,	" 10,	Henry Chapin.
Horton, William B.	Roxbury,	" 8,	Sherman Leland.
Houghton, Augustine F.	Lancaster,	" 4,	B. F. Thomas.
Hour, Loriman,	Lancaster,	" 10,	Isaac Davis.
Huggins, Chester M.	Boston,	" 10,	Ellis Gray Loring.
Hughes, George,	Boston,	" 20,	Bradford Sumner.
Hunt, David H.	Danvers,	" 14,	John G. King.
Jennings, Ira,	Natick,	" 17,	Nathan Brooks.
Keith, Nathaniel,	Boston,	" 3,	Ellis Gray Loring.
Kimball, Frederick N.	Boston,	" 4,	Bradford Sumner.
Laharty, Thomas,	Lawrence,	" 20,	James H. Duncan.
Lamb, George W.	Boston,	" 7,	Bradford Sumner.
Lamson, James,	Charlton,	" 11,	Isaac Davis.
Lesure, William T.	Grafton,	" 20,	Henry Chapin.
Lewis, Charles H.	Malden,	Mar. 14,	William Minot.
Lyman, Robert,	Northfield,	Jan. 12,	Richard E. Newcomb.
Manchester, Rufus,	Springfield,	April 18,	E. D. Beach.
Marsh, Hiram,	Boston,	" 28,	Bradford Sumner.
Marshal, J. Marshal,	Northfield,	Mar. 22,	Richard E. Newcomb.
McCool, John,	Boston,	April 27,	Bradford Sumner.
McIntosh, Michal,	Roxbury,	" 1,	Sherman Leland.
Melony, E.	Greenfield,	Jan. 12,	Richard E. Newcomb.
Mills, Gordon,	Springfield,	April 1,	E. D. Beach.
Monson, William B.	Whately,	Mar. 7,	Richard E. Newcomb.
Morse, Henry,	Newburyport,	April 5,	David Roberts.
Morton, Isaac,	Taunton,	" 28,	C. J. Holmes.
Newhall, William P.	Lynn,	" 3,	David Roberts.
Nottage, James C.	Newton,	" 3,	Nathan Brooks.
Osgood, William,	Boston,	" 26,	William Minot.
Pinkham, Richard G.	Waltham,	" 24,	George W. Warren.
Pollard, Joshua H.	Boston,	" 12,	Bradford Sumner.
Poole, Samuel A. et al.	Boston,	Oct'r. 2,	Willard Phillips.
Potter, Francis,	Concord,	April 7,	Nathan Brooks.
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